UNITED STATES

REPORTS

553

OCT. TERM 2007

UNITED STATES REPORTS

VOLUME 553

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2007

APRIL 15 THROUGH JUNE 12, 2008

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 2012

Printed on Uncoated Permanent Printing Paper

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

MICHAEL B. MUKASEY, ATTORNEY GENERAL.
PAUL D. CLEMENT, SOLICITOR GENERAL.[1]
GREGORY G. GARRE, ACTING SOLICITOR GENERAL.[2]
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
JUDITH A. GASKELL, LIBRARIAN.

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[1] Solicitor General Clement resigned effective June 2, 2008. See *post*, p. V.

[2] Mr. Garre became Acting Solicitor General effective June 2, 2008.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 1, 2006, viz.:

For the District of Columbia Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, SAMUEL A. ALITO, JR., Associate Justice.

For the Ninth Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

For the Federal Circuit, JOHN G. ROBERTS, JR., Chief Justice.

February 1, 2006.

(For next previous allotment, see 546 U. S., p. V.)

RESIGNATION OF THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 2, 2008

Present: CHIEF JUSTICE ROBERTS, JUSTICE STEVENS, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE ALITO.

THE CHIEF JUSTICE said:

General Clement, could I have you approach the lectern please?

The Court at this time wishes to note for the record that you have been serving as the Solicitor General since July 10, 2004. The Court recognizes the significant responsibilities that were placed upon you to represent the government of the United States before this Court and to perform other important functions on behalf of the Executive Branch.

On behalf of my colleagues, I thank you, General Clement, for a job well done. You have our sincere appreciation and best wishes for the future.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2000 edition.

Cases reported before page 1001 are those decided with opinions of the Court. Cases reported on page 1001 *et seq.* are those in which orders were entered.

	Page
Abbott Laboratories; Apotex, Inc. *v.*	1031
ABC; United States *v.*	1016
Abiodun *v.* United States	1038
Abreu *v.* United States	1034
Abulkhair *v.* Smith	1081
Accredited Home Lenders, Inc.; Drain *v.*	1015
Acevedo; Gilyard *v.*	1088
Adams, *In re*	1064
Adams; Galindo Gonzalez *v.*	1082
Adams *v.* George	1022
Adams; Thinkstream, Inc. *v.*	1050
Adams *v.* United States	1025
Adderly *v.* United States	1090
Adkins *v.* Konteh	1040
Adonai-Adoni *v.* King	1084
Adonai-Adoni *v.* Prison Health Services	1084
Advantage Media, LLC *v.* Hopkins	1054
Aguilar *v.* California	1072
Aguirre Zatisaval *v.* United States	1045
Agway, Inc.; Sleeper Farms *v.*	1031
Aigner; Splittorff *v.*	1065
AK Steel Corp. Retirement Accumulation Pension Plan *v.* West	1092
Alabama; Eggers *v.*	1077
Alabama; Fisher *v.*	1037
Alabama; Stephens *v.*	1035
Alaska; Baseden *v.*	1022
Albert *v.* Johnson	1055
Albuquerque Title Co.; Showalter *v.*	1066
Alcantara *v.* United States	1027
Aldea *v.* United States	1047

	Page
Aleman *v.* Hubert	1027
Alford *v.* Cumberland County	1064
Alford *v.* United States	1073
Align Technology, Inc.; Ormco Corp. *v.*	1032
Al-Jabi; Canas *v.*	1065
Allan *v.* United States	1054
Allegrino *v.* State Bar of Cal.	1018
Allen; Arthur *v.*	1004
Allen; Callahan *v.*	1098
Allen *v.* United States	1100
Alliance Gaming Corp.; CIAS Inc. *v.*	1018
Allison Engine Co. *v.* United States *ex rel.* Sanders	662
Almager; Langford *v.*	1037
Almager; Williams *v.*	1097
Al Odah *v.* United States	723
Alonzo-Ubina *v.* United States	1043
Alston *v.* Redevelopment Authority of Philadelphia	1048
Alston *v.* United States	1086
Altamirano-Quintero *v.* United States	1019
Alvarado-Lopez *v.* United States	1075
Alvarado-Molina *v.* United States	1029
Alvarado-Rodriguez *v.* United States	1075
American Bankers Ins. Co. of Fla.; Stringer *v.*	1052
American Express Financial Advisors; Carlson *v.*	1103
American Isuzu Motors, Inc. *v.* Ntsebeza	1028
Andersen *v.* Griffin	1059
Anderson *v.* Bradt	1084
Anderson *v.* Cagle's Inc.	1093
Anderson *v.* Donald	1049
Anderson *v.* Martino	1009
Anderson *v.* United States	1024,1046
Anderson *v.* Virginia	1054
Anderson *v.* Wall	1072
Andrade-Real *v.* United States	1029
Andreola *v.* Morgan	1011
Andreozzi *v.* California Dept. of Corrections	1056
Andrews *v.* Lawler	1023
Andrews *v.* United States	1047
Angino *v.* Middle Paxton Township	1093
Ankeny *v.* United States	1034
Anou Lo *v.* Endicott	1049
Anthony *v.* United States	1101
APAC Customer Services, Inc.; McIntyre-Handy *v.*	1030
Apker; Joost *v.*	1074

	Page
Apotex Corp. *v.* Merck & Co.	1090
Apotex, Inc. *v.* Abbott Laboratories	1031
Archer *v.* Crawford	1071
Archer *v.* United States	1002
Ardito *v.* NBC Universal, Inc.	1005
Arenal *v.* Office of Personnel Management	1043
Argentina *v.* United States	1099
Argonaut Ins. Co.; Jou *v.*	1053
Arizona; Bryant *v.*	1058
Arizona; Fitch *v.*	1068
Arizona *v.* Gant	1078
Arizona; Mendoza-Lares *v.*	1010
Arizona; Ramirez *v.*	1056
Arizona; Robinson *v.*	1097
Arizona; Velazquez *v.*	1014
Arizpe *v.* Peters	1019
Arkansas; Williams *v.*	1096
Arminak & Associates, Inc.; MeadWestvaco Calmar, Inc. *v.*	1102
Arminak & Associates, Inc.; Saint-Gobain Calmar, Inc. *v.*	1102
Armstrong *v.* United States	1090
Arnett *v.* Combs	1005
Arredondo *v.* Gulf Bend Center	1026
Arreguin-Aguilar *v.* United States	1063
Arreola-Leyva *v.* United States	1090
Arthur *v.* Allen	1004
Artus; DeWese *v.*	1069
Ashley *v.* United States	1102
Associated Outdoor Clubs, Inc.; Dar Dar *v.*	1033
Associate Justice, Supreme Court of U. S.; Murray *v.*	1052
Astrue; Heim *v.*	1054
Astrue; Luckette *v.*	1030
Astrue; Wright *v.*	1092
AT&T Mobility, LLC; Graham *v.*	1032
Attorney General; Awad *v.*	1055
Attorney General; Bintzler *v.*	1013
Attorney General; Dalomba Fontes *v.*	1055
Attorney General; Debeato *v.*	1067
Attorney General; Demjanjuk *v.*	1061
Attorney General; Ejedawe *v.*	1097
Attorney General; Lagoye *v.*	1038
Attorney General; Mozes *v.*	1084
Attorney General; Ndong-Ntoutoum *v.*	1014
Attorney General; Oghenesoro *v.*	1009
Attorney General; Peguero-Cruz *v.*	1055

Page
Attorney General; Perdomo *v.* 1033
Attorney General; Qazza *v.* 1062
Attorney General; Saravia-Paguada *v.* 1064
Attorney General; Shafiq *v.* 1033
Attorney General; Tae Kyong Kim *v.* 1031
Attorney General; That Hin Liong *v.* 1058
Attorney General; Volkova *v.* 1080
Attorney General; Yi Qiang Yang *v.* 1031
Attorney General; Zamora *v.* 1004
Attorney General of Cal.; Sanders *v.* 1031
Attorney General of Fla.; Lightbourn *v.* 1059
Attorney General of Fla.; Patterson *v.* 1056
Attorney General of Nev.; Plumlee *v.* 1085
Attorney General of Ohio; Tyler *v.* 1055
Attorney General of Pa.; Gera *v.* 1070
Attorney Registration and Disciplinary Comm'n; Stoller *v.* 1063
AT&T Pension Benefit Plan *v.* Call 1102
Atwell *v.* Metterau 1078
Aventis Pharmaceuticals; Daniel *v.* 1023
Awad *v.* Mukasey 1055
Awala *v.* United States 1047
Babos *v.* Ohio 1008
Bagley *v.* Bourne 1039
Bagley; Reynolds *v.* 1097
Bahrs *v.* McCann 1045
Bailey, *In re* 1003,1053
Baker; Davis *v.* 1021
Bakhtiari *v.* Lutz 1033
Bakke *v.* Kane 1083
Bakker; Henderson *v.* 1037
Balderas *v.* United States 1091
Ballard; Carr *v.* 1091
Balzarotti *v.* McNeil 1103
Bamberg *v.* United States 1090
Bandjan *v.* United States 1043
Bank of China; Orient Mineral Co. *v.* 1079
Bank One; Ware *v.* 1056
Bank One, N. A.; Young *v.* 1094
Bankruptcy Judge, U. S. Bankruptcy Court; Brown *v.* 1018
Banks *v.* United States 1087,1100
Banushi *v.* New York City 1032
Bao *v.* Houston 1041
Barajas-Romo *v.* United States 1074
Barber *v.* Epps 1085

	Page
Barclay *v.* United States	1047
Bardwell *v.* Bardwell	1097
Barefield *v.* United States	1043
Barlow *v.* United States	1046,1047
Barnes *v.* Washington Mut. Bank	1057
Barnhart *v.* Lawler	1038
Barnstable School Committee; Fitzgerald *v.*	1093
Barrera-Renteria *v.* United States	1076
Barrett *v.* Koren	1066
Barrett *v.* Waldron	1080
Barrington *v.* Lockheed Martin	1095
Barron *v.* United States	1012
Barron Gonzales *v.* United States	1012
Barron Gonzalez *v.* United States	1012
Barrow; Smith *v.*	1053
Bartos; Pettijohn *v.*	1056
Barzee *v.* Utah	1056
Baseden *v.* Alaska	1022
Battle, *In re*	1064
Bautista Rivera *v.* Snow	1054
Baynes *v.* Pennsylvania	1023
Bazan Garza *v.* United States	1099
Baze *v.* Rees	35
Bazen *v.* United States	1002
Bazzetta *v.* Michigan Dept. of Corrections	1020
Bea *v.* Johnson	1048
Beard; Bundy *v.*	1098
Beason *v.* United States	1006,1103
Beaty; Republic of Iraq *v.*	1063
Becerill Garcia *v.* United States	1075
Becerra *v.* United States	1075
Begay *v.* United States	137
Bell *v.* Kelly	1031
Bell; Kuroda *v.*	1097
Bell *v.* Lyons	1049
Bell; Travis *v.*	1097
Bell; West *v.*	1008
Bell-Bey *v.* Roper	1035
Beltran *v.* North Carolina	1091
Bembenek *v.* Wisconsin	1080
Benavides *v.* Texas	1037
Bender *v.* Dudas	1017
Benitec Australia, Ltd.; Nucleonics, Inc. *v.*	1014
Benn *v.* Washington	1080

	Page
Bennett *v.* United States	1029,1095
Benson *v.* Potter	1103
Berkeley *v.* California	1020
Bernard *v.* Michigan	1055
Bernazal *v.* United States	1013
Berry, *In re*	1062
Berry *v.* Epps	1006
Berry *v.* Mississippi	1063
Betanzos-Centeno *v.* United States	1061
Bettis *v.* Powers	1084
Betty *v.* Florida	1008
Bey *v.* United States	1016
Bieganowski *v.* United States	1043
Bigby *v.* Wolfenbarger	1071
Bintzler *v.* Mukasey	1013
Bintzler *v.* Raemisch	1061
Biomedical Patent Mgmt. Corp. *v.* Cal. Dept. of Health Services	1003
Biros *v.* Strickland	1006
Bishop *v.* Quarterman	1039
Bishop *v.* United States	1007
Bishop *v.* U. S. Court of Appeals	1048
Bixby *v.* Jones	1070
Bjorn *v.* California	1057
Blackshear; Brown *v.*	1018
Blackthorne *v.* United States	1011
Blackwell *v.* California	1040
Blake *v.* Florida	1039
Blevins; Ortiz *v.*	1096
Blount *v.* Johnson	1023
Blue Lake Housing Authority; Carls *v.*	1032
Board of Bar Overseers of Sup. Jud. Ct. of Mass.; Firstenberger *v.*	1069
Board of Bar Overseers of Sup. Jud. Ct. of Mass.; Johnson *v.*	1010
Board of Immigration Appeals; Rehman *v.*	1040
Board of Trustees of Ohio Carpenters' Pension Fund *v.* Bucci	1093
Bobby; Doak *v.*	1022
Boggs; Camden-Clark Memorial Hospital Corp. *v.*	1017
Boggs *v.* United States	1043
Bond; Stewart *v.*	1095
Bonner *v.* Peake	1005
Bon-Ton Department Stores, Inc.; Bouchat *v.*	1014
Bookman *v.* United States	1074
Bosch; Rosario Robles *v.*	1015
Boston; Erickson *v.*	1038
Boston Police Dept.; Nelson *v.*	1010

	Page
Boswell *v.* California	1058
Bouchat *v.* Bon-Ton Department Stores, Inc.	1014
Boumediene *v.* Bush	723
Bourne; Bagley *v.*	1039
Bower *v.* Quarterman	1006
Bowers *v.* Singer	1020
Bowersox; Newson *v.*	1059
Bowman *v.* Florida	1027
Boykins *v.* Boykins	1018
Bradford *v.* United States	1015
Bradt; Anderson *v.*	1084
Braley *v.* California	1103
Braswell *v.* United States	1025
Brauninger *v.* Motes	1065
Bray *v.* United States	1099
Brewington *v.* United States	1074
Bridge *v.* Phoenix Bond & Indemnity Co.	639
Brigano; Virruela Lopez *v.*	1007
Briggs *v.* Moore	1057
Bright *v.* Wright	1083
Brillhart *v.* Ragland	1068
Briones-Zapata *v.* United States	1102
Brookins *v.* McNeil	1036
Brooks *v.* United States	1102
Brown *v.* Blackshear	1018
Brown *v.* Court of Criminal Appeals of Okla.	1038
Brown *v.* DiGuglielmo	1085
Brown *v.* Donald	1044
Brown *v.* Illinois	1086
Brown *v.* Johnson	1056
Brown *v.* Oklahoma	1020
Brown *v.* Rivera	1047
Brown; Sanders *v.*	1031
Brown; Smith *v.*	1053
Brown *v.* United States	1044,1061
Brown *v.* Williams	1101
Brunsman; Ruff *v.*	1038
Bryan *v.* Tennessee	1071
Bryant *v.* Arizona	1058
Bryant *v.* Pennsylvania	1022
Bucci; Board of Trustees of Ohio Carpenters' Pension Fund *v.*	1093
Buchmeyer; Florance *v.*	1093
Bueno *v.* United States	1061
Bullock *v.* United States	1024

	Page
Bundy *v.* Beard	1098
Bureau of Alcohol, Tobacco, Firearms & Explosives; Morgan *v.*	1033
Burgess *v.* United States	124
Burns; Lane *v.*	1072
Burt; Floyd *v.*	1083
Burtt; Cochrane *v.*	1021
Bush; Boumediene *v.*	723
Bush *v.* Martin	1084
Buss; Garth *v.*	1006
Buss *v.* Stevens	1048
Buss; Stevens *v.*	1034
Bussell *v.* United States	1076
Butler; Coleman *v.*	1095
Butler *v.* Illinois	1020
Butler *v.* United States	1046
Byrd *v.* United States	1042
Cadle Co. *v.* Dennis	1033
Cagle's Inc.; Anderson *v.*	1093
Cain; Meads *v.*	1057
Cain; Miller *v.*	1007
Cain; Picou *v.*	1022
Cain; Reese *v.*	1096
Cain; Sloan *v.*	1071
Calderon *v.* Hogan	1034
Caldwell *v.* Quarterman	1081
California; Aguilar *v.*	1072
California; Berkeley *v.*	1020
California; Bjorn *v.*	1057
California; Blackwell *v.*	1040
California; Boswell *v.*	1058
California; Braley *v.*	1103
California; Ceniceros *v.*	1020
California; Clarke *v.*	1049
California; Dodson *v.*	1037
California; Fluker *v.*	1081
California; Gabrill *v.*	1062
California; Garcia *v.*	1041
California; Gilliam *v.*	1082
California; Hamilton *v.*	1010
California; Hammett *v.*	1069
California; Harmon *v.*	1010
California; Hill *v.*	1010
California; Hon Lau *v.*	1040
California; Lewis *v.*	1016

Page
California; Linton *v.* 1011
California; Martin *v.* 1038,1082
California; Medina *v.* 1039
California; Meekins *v.* 1023
California; Moton *v.* 1058
California; Myers *v.* 1056
California; Nichols *v.* 1098
California; PuriTec *v.* 1005
California; Rohner *v.* 1037
California; Sanchez *v.* 1010
California; Snipes *v.* 1020
California; Stambaugh *v.* 1096
California; Swain *v.* 1081
California; Tarkington *v.* 1038
California; Teitgen *v.* 1021
California; Tewolde *v.* 1021
California; Ticas *v.* 1058
California; Viray *v.* 1077
California; Willems *v.* 1082
California; Winders *v.* 1083
California; Woodall *v.* 1095
California; Zucker *v.* 1039
California Dept. of Corrections; Andreozzi *v.* 1056
California Dept. of Health Services; Biomedical Patent Corp. *v.* .. 1003
Call; AT&T Pension Benefit Plan *v.* 1102
Callaghan *v.* Florida 1018
Callahan *v.* Allen 1098
Calligan *v.* Wilson 1095
Calloway *v.* Montgomery 1066
Calumet City; Mainstreet Organization of Realtors *v.* 1079
Calumet Park; Hefley *v.* 1103
Camacho-Lopez *v.* United States 1075
Camarillo-Cazares *v.* United States 1087
Camarillo-Cook *v.* United States 1087
Camden-Clark Memorial Hospital Corp. *v.* Boggs 1017
Cameron *v.* United States 1072
Campbell *v.* Commissioner 1048
Campbell *v.* Equal Employment Opportunity Comm'n 1011
Campbell *v.* Kentucky 1021
Campbell *v.* Mullin 1022
Campbell *v.* Trevino 1091
Cana *v.* United States 1045
Canales *v.* Quarterman 1027
Canas *v.* Al-Jabi 1065

Page
Caplan; Donovan *v.* 1018
Cappocia *v.* United States 1042
Carden *v.* General Motors Corp. 1094
Cardona *v.* United States 1010,1074
Carls *v.* Blue Lake Housing Authority 1032
Carlson *v.* American Express Financial Advisors 1103
Carlton; Gosnell *v.* 1068
Carmelo *v.* United States 1013
Carr *v.* Ballard 1091
Carr, Hunt & Joy, LLP; Whiteside *v.* 1048
Carrillo-Rodriguez *v.* United States 1012
Carrion *v.* Wilson 1097
Carroll; Zuppo *v.* 1023
Carter *v.* United States 1042
Casillas *v.* Quarterman 1081
Castaneda-Perez *v.* United States 1075
Castellanos-Reyes *v.* United States 1075
Castillo-Rodriguez *v.* United States 1012
Castillo-Zuniga *v.* United States 1075
Castro *v.* United States 1075,1100
Castro-Catete *v.* United States 1087
Castro-De Los Santos *v.* United States 1045
Castro Guzman *v.* United States 1075
Castro-Juarez *v.* United States 1045
Catota Molina *v.* United States 1012
Caudill; Koher *v.* 1058
Cazares-Camarillo *v.* United States 1087
C. B. C. Distribution & Mktg.; Major League Baseball Media *v.* 1090
CBOCS West, Inc. *v.* Humphries 442
Ceja-Licea *v.* United States 1014
Celley *v.* Stevens 1037
Ceniceros *v.* California 1020
Censke *v.* Clinton County Sheriff's Dept. 1071
Censke *v.* Department of Justice 1016
Centerior Energy Corp. *v.* Mikulski 1031
Central Mut. Ins. Co.; Imler *v.* 1069
Cesar-Casas *v.* United States 1025
Chamberlain, *In re* 1104
Chamberlain *v.* Texas 1104
Chambers *v.* Rozum 1008
Chambers *v.* United States 1003,1061
Champney *v.* Pennsylvania 1067
Chandler; Funches *v.* 1037
Chao; Morrison *v.* 1005

Page
Charles *v.* Quarterman 1050
Charter Township of Meridian; Living Water Church of God *v.* .. 1093
Chattanooga State Technical Community College; Shoaga *v.* 1011
Chaux-Sarria *v.* United States 1027
Chavez *v.* Runnels 1035
Chavez-Morales *v.* United States 1087
Cheatham *v.* Texas 1071
Cherry *v.* Johnson 1009
Cherry *v.* Wynder 1021
Chertoff; Richlin Security Service Co. *v.* 571
Chicago; St. John's United Church of Christ *v.* 1032
Chicago Transit Authority; Parker *v.* 1033
Childress *v.* Knowles 1096
Childs *v.* Michigan 1036
Chinnici *v.* United States 1072
Chisum *v.* Junell 1041
CHW Central Cal. Mercy Hospital; Pineda *v.* 1040
CIAS Inc. *v.* Alliance Gaming Corp. 1018
City. See also name of city.
City Nat. Bank of W. Va. *v.* Dept. of Agric., Farm Service Agency 1053
Clarke *v.* California 1049
Clarke; Shandola *v.* 1059
Clarke *v.* United States 1086
Clavo *v.* United States 1100
Clay *v.* Quarterman 1077
Clay *v.* United States 1089
Clenney *v.* Norris 1022
Cleveland *v.* Oklahoma 1027
Clime *v.* United States 1075
Cline *v.* Cline 1065
Clinton County Sheriff's Dept.; Censke *v.* 1071
Clintwood Elkhorn Mining Co.; United States *v.* 1
Cloud *v.* United States 1060
Clymer *v.* Combine 1057
Cochrane *v.* Burtt 1021
Cocke County Juvenile Court; Reed *v.* 1020
Cody *v.* Michigan 1009
Cofield *v.* United States 1014
Cohen & Grigsby, P. C.; Iwanejko *v.* 1030
Cohens *v.* Lundquist 1098
Colbert *v.* United States 1045
Cole *v.* Oklahoma 1055
Coleman *v.* Butler 1095
Collard, *In re* 1003,1031

Page

Collier *v.* McDaniel 1057
Collins *v.* United States 1046
Colorado; Kansas *v.* 1092
Colosi *v.* Johnson 1085
Colton *v.* Shannon 1071
Comba; Kearns *v.* 1005
Combine; Clymer *v.* 1057
Combs; Arnett *v.* 1005
Combs *v.* United States 1077
Comier *v.* Schriro 1084
Commissioner; Campbell *v.* 1048
Commissioner; Kleinman *v.* 1076
Commissioner; Medical Transportation Management Corp. *v.* ... 1034
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Comptroller of State of Tex.; Arnett *v.* 1005
Comrie *v.* United States 1077
Conces *v.* United States 1042
Conerly; Heinle *v.* 1037
Conklin *v.* Sherry 1083
Connecticut; Slater *v.* 1085
Conner *v.* United States 1087
Connolly *v.* Fok 1056
Consolidated Edison Corp.; Gorman *v.* 1093
Contreras *v.* United States 1101
Conway *v.* Illinois 1021
Cooey *v.* Strickland 1014,1103
Cook *v.* United States 1090
Cook County Public Guardian; Struck *v.* 1023
Cooks *v.* Florida 1069
Cooper *v.* Plano 1041
Cooper *v.* Quarterman 1035
Corbett; Gera *v.* 1070
Corley *v.* United States 1026
Cornelius *v.* Howell 1057
Corrections Commissioner. See name of commissioner.
Cortes-Sanchez *v.* United States 1046
Cortez Masto; Plumlee *v.* 1085
Costa *v.* Curry 1081
Costa *v.* United States 1087
Cote *v.* United States 1073
Counce, *In re* 1092
Council for Discipline of Neb. Supreme Court; Widtfeldt *v.* 1018
Counts *v.* United States 1002

Page

County. See name of county.
Court of Appeals. See U. S. Court of Appeals.
Court of Criminal Appeals of Okla.; Brown *v.* 1038
Cousar *v.* Pennsylvania 1035
Cousin *v.* Ercole 1096
Cousin *v.* Massachusetts 1007
Cox *v.* United States 1076,1090
Craig *v.* United States 1094
Cramer *v.* Florida 1009
Crane, Inc. *v.* Oney 1005
Crawford; Archer *v.* 1071
Crawford *v.* Department of Homeland Security 1054
Crawford *v.* Illinois 1098
Crawford *v.* Marion County Election Bd. 181
Crawford *v.* Metropolitan Govt. of Nashville & Davidson County 1078
Crawford; Taylor *v.* 1004
Crawford *v.* Texas 1063
Crepeau *v.* United States 1066
Crider *v.* United States 1024
Crocker *v.* United States 1060
Cross *v.* Johnson 1011
Crowe *v.* Donald 1077
Crowe *v.* Hall 1007,1103
Cuellar *v.* United States 550
Cuesta *v.* Pennsylvania 1079
Cuevas-Torres *v.* United States 1027
Culverson *v.* Davison 1055
Cumberland County; Alford *v.* 1064
Cummings *v.* Equal Employment Opportunity Comm'n 1077
Cunningham *v.* United States 1101
Curbelo *v.* United States 1073
Curlee *v.* Mississippi 1095
Currie *v.* United States 1090
Curry; Costa *v.* 1081
Curry *v.* United States 1102
Curry; White *v.* 1084
Dabney *v.* United States 1025
Dade, *In re* 1017
Dade *v.* United States 1015
Daley; Wright *v.* 1049
Dallas-Fort Worth Int'l Airport Bd.; United States *ex rel.* Heath *v.* 1094
Dalomba Fontes *v.* Mukasey 1055
Daly *v.* Georgia 1039
Daniel *v.* Aventis Pharmaceuticals 1023

Page
Daniel *v.* Roussel 1023
Daniel *v.* Sanofi-Aventis 1023
Daniels *v.* United States 1101
Dann; Tyler *v.* 1055
Darby *v.* North Dakota 1058
Darby *v.* United States 1086
Dar Dar *v.* Associated Outdoor Clubs, Inc. 1033
Dar Dar *v.* Tampa Greyhound Track 1033
Darlington *v.* Darlington 1049
Da Vang, *In re* 1003
Davies, *In re* 1030
Davis, *In re* 1064
Davis *v.* Baker 1021
Davis; Department of Revenue of Ky. *v.* 328
Davis *v.* Kansas 1059
Davis *v.* Lawler 1097
Davis *v.* Louisiana 1096
Davis *v.* Prudden 1020
Davis; Thompson *v.* 1052
Davis *v.* United States 1074,1090
Davison; Culverson *v.* 1055
Dawson *v.* Johnson 1040
Dawson *v.* United States 1025
Dearinger *v.* United States 1067
de Asencio; Tyson Foods, Inc. *v.* 1093
Debeato *v.* Mukasey 1067
Debreus *v.* United States 1072
De Jesus Estacio *v.* Oregon Judicial Dept. 1103
Delacruz *v.* Massachusetts 1059
De La Rosa *v.* United States 1012
De La Rosa-Hernandez *v.* United States 1012
Delaware; Hall *v.* 1010
Delaware; St. Louis *v.* 1027
Delaware; Williams *v.* 1097
Delaware; Winn *v.* 1085
Delaware County Court; Smith *v.* 1041
Del Bal-Villegas *v.* United States 1029
Delecke Welding, Inc.; Raimondo *v.* 1017
Delgado *v.* United States 1064
Demjanjuk *v.* Mukasey 1061
Dennis; Cadle Co. *v.* 1033
Denny; Murphy *v.* 1010
Denton *v.* Hyman 1003
Departmental Discip. Comm. for First Jud. Dept.; Williams *v.* 1002,1018

Page
Department of Agric., Farm Serv. Agcy.; City Nat. Bank of W. Va. *v.* 1053
Department of Air Force; Pierce *v.* 1019
Department of Homeland Security; Crawford *v.* 1054
Department of Justice; Censke *v.* 1016
Department of Justice; Zhen Hua Dong *v.* 1053
Department of Revenue of Ky. *v.* Davis 328
Department of Veterans Affairs; Lee *v.* 1058
DePineda, *In re* 1015,1030
Depository Trust & Clearing Corp.; Vyta Corp. *v.* 1031
Detroit; Peet *v.* 1032
DeVries; Shell *v.* 1036
DeWese *v.* Artus 1069
Diaz Ramirez *v.* United States 1100
Diaz-Ramos *v.* Hyundai Motor Co. 1018
Dickerson *v.* Donald 1091
Dicks *v.* United States 1101
Diestel *v.* Hines 1079
Diggs *v.* United States 1073
DiGuglielmo; Brown *v.* 1085
DiGuglielmo; Simeone *v.* 1036
Dillon *v.* Texas 1041
Dinwiddie; Smith *v.* 1035
DiPietro *v.* United States 1024
Director of penal or correctional institution. See name or title of director.
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
Dixon *v.* United States 1025
Doak *v.* Bobby 1022
Dodson *v.* California 1037
Doe *v.* United States 1045,1094
Dohan *v.* United States 1034
Dominguez-Ramirez *v.* United States 1034
Donald; Anderson *v.* 1049
Donald; Brown *v.* 1044
Donald; Crowe *v.* 1077
Donald; Dickerson *v.* 1091
Donato *v.* Florida 1096
Dong *v.* Department of Justice 1053
Donovan *v.* Caplan 1018
Dooley *v.* Quarterman 1021
Dormire; Koenig *v.* 1049
Dorsey *v.* United States 1100
Douglas County District Court; Hubler *v.* 1041

	Page
Drain *v.* Accredited Home Lenders, Inc.	1015
Drew *v.* Scribner	1059
Driver; Watkins *v.*	1073
Dropalski *v.* Stewart	1020
Drum *v.* Supreme Court of Cal.	1079
DTR Tenn., Inc.; Lollar *v.*	1062
Dudas; Bender *v.*	1017
Duke Univ.; Richards *v.*	1048
du Pont de Nemours & Co.; Taka *v.*	1004
Durison; Johnson *v.*	1065
Durison; Royal *v.*	1065
Duval *v.* United States	1067
Dwyer *v.* United States	1043
Dyno *v.* Johnson City	1103
Echols *v.* Kemna	1041
Edge *v.* United States	1060
Edger *v.* Moore	1024
Edwards *v.* Mississippi	1095
Edwards County Sheriff's Dept.; Murray *v.*	1035
Eggers *v.* Alabama	1077
E. I. du Pont de Nemours & Co.; Taka *v.*	1004
Ejedawe *v.* Mukasey	1097
Ellis *v.* Emery	1099
Ellis *v.* United States	1074
Ellis *v.* Virginia	1009
Embree *v.* United States	1088
Emery; Ellis *v.*	1099
Emmett *v.* Johnson	1051
Endicott; Anou Lo *v.*	1049
England *v.* Quarterman	1034
Engquist *v.* Oregon Dept. of Agriculture	591
Epps; Barber *v.*	1085
Epps; Berry *v.*	1006
Equal Employment Opportunity Comm'n; Campbell *v.*	1011
Equal Employment Opportunity Comm'n; Cummings *v.*	1077
Ercole; Cousin *v.*	1096
Erickson *v.* Boston	1038
Erwin; Thorpe *v.*	1015
Escarcega-Diaz *v.* United States	1088
Escarcega-Quinones *v.* United States	1087
Escareno Sanchez *v.* United States	1029
Escarsega-Diaz *v.* United States	1088
Espinoza *v.* United States	1045,1075
Estrada Montonyo *v.* United States	1046

	Page
Eugene *v.* United States	1042
Eurodif S. A.; United States *v.*	1003
Eurodif S. A.; USEC Inc. *v.*	1004
Evans; Flores *v.*	1017
Evans; Fogarty *v.*	1018
Evans *v.* Jenkins	1033
Evans; Murphy *v.*	1096
Evans *v.* Suter	1062
Evans *v.* United States	1101
Evans-Martinez, *In re*	1031
Excel Innovations, Inc. *v.* Indivos Corp.	1017
Exxon Mobil Corp. *v.* Grefer	1014
Fagan *v.* United States	1049
Falls *v.* Lewis	1057
Farley, *In re*	1030
Fashewe *v.* United States	1049
Fazzini *v.* U. S. Parole Comm'n	1050
Featherstone *v.* Pfeiffer	1003
Federal Communications Comm'n; Thacker *v.*	1004
Federal Housing Finance Bd.; Xiangyuan Zhu *v.*	1078
Felix-Peraza *v.* United States	1073
Fellin *v.* Hazle Township Zoning Hearing Bd.	1080
Fennell *v.* Quarterman	1083
Ferguson *v.* United States	1049
Fernandes *v.* Sparta Township Council	1066
Festo Corp. *v.* Shoketsu Kinzoku Kogyo Kabushiki Co.	1093
Festo Corp. *v.* SMC Corp.	1093
Feurtado *v.* McNair	1029
Feurtado *v.* United States	1012
Fielding *v.* Patrick	1022
Fields *v.* United States	1067,1087
Figueroa *v.* Weisenfreund	1062
Figueroa-Lozada *v.* United States	1099
Finley *v.* Tennessee	1057
Finnan; Wilms *v.*	1068
Firstenberger *v.* Board of Bar Overseers of Sup. Jud. Ct. of Mass.	1069
Fischer; Fox *v.*	1049
Fisher *v.* Alabama	1037
Fitch *v.* Arizona	1068
Fitzgerald *v.* Barnstable School Committee	1093
Flemming *v.* New York	1009
Florance, *In re*	1053,1092
Florance *v.* Buchmeyer	1093
Flores *v.* Evans	1017

Page
Flores *v.* Peake 1097
Flores-Cortez *v.* United States 1102
Flores Rosales *v.* United States 1095
Flores Solorzano *v.* United States 1011
Florida; Betty *v.* 1008
Florida; Blake *v.* 1039
Florida; Bowman *v.* 1027
Florida; Callaghan *v.* 1018
Florida; Cooks *v.* 1069
Florida; Cramer *v.* 1009
Florida; Donato *v.* 1096
Florida; Foley *v.* 1036
Florida; Forbes *v.* 1069
Florida; Frances *v.* 1039
Florida; Gomez *v.* 1027
Florida; Holloman *v.* 1049
Florida; Johnson *v.* 1007
Florida; Kenon *v.* 1103
Florida; Khianthalat *v.* 1072
Florida; Lima *v.* 1022
Florida; Manago *v.* 1006
Florida; Mathis *v.* 1040
Florida; Mills *v.* 1098
Florida; Montesino *v.* 1057
Florida; Rodriguez *v.* 1071
Florida; Schwab *v.* 1059
Florida; Shelton *v.* 1083
Florida; Warlick *v.* 1041
Florida Bar; Gould *v.* 1032
Florida Bar; Sibley *v.* 1002,1092
Florida Dept. of Agriculture and Consumer Servs.; TSA Stores *v.* 1033
Floyd *v.* Burt 1083
Fluker *v.* California 1081
Fogarty *v.* Evans 1018
Fok; Connolly *v.* 1056
Foley *v.* Florida 1036
Foley *v.* Simpson 1068
Folino; Harvey *v.* 1071
Folino; Hoffman *v.* 1083
Folino; Wallace *v.* 1034
Fontes *v.* Mukasey 1055
Forbes *v.* Florida 1069
Forbes *v.* United States 1053
Ford; T-Mobile USA, Inc. *v.* 1065

	Page
Ford *v.* United States	1026
Fordham *v.* McNeil	1083
Fortner; McCabe *v.*	1023
Foster *v.* United States	1061
Foster *v.* Yates	1036
Fox *v.* Fischer	1049
Fox *v.* United States	1025
Fox; Wiederhold *v.*	1042
Frances *v.* Florida	1039
Francis *v.* United States	1013
Franklin *v.* Gunja	1060
Franklin *v.* Lundquist	1019
Franklin *v.* Roper	1067
Franqui *v.* McNeil	1040
Frazier *v.* Ohio	1015
Frazier *v.* US Airways, Inc.	1080
Fredrick; Merriweather *v.*	1008
Freeman *v.* South Carolina Dept. of Corrections	1081
Friend *v.* Pennsylvania	1068
Froelich *v.* Lewis Law Firm, PC	1048
Fuentes-Membreno *v.* United States	1087
Fuller *v.* McKeeman	1082
Fuller *v.* Stovall	1082
Fuller *v.* United States	1088
Funches *v.* Chandler	1037
Funches *v.* Walsh	1022
Gabrill *v.* California	1062
Gadd *v.* United States	1099
Gadson; Johnson *v.*	1049,1053
Gagne *v.* O'Brien	1058
Galindo Gonzalez *v.* Adams	1082
Gallo *v.* Texas	1080
Galloway *v.* United States	1073
Gamba *v.* United States	1050
Gamez-Herran *v.* United States	1088
Gamino *v.* United States	1027
Gant; Arizona *v.*	1078
Garcia *v.* California	1041
Garcia *v.* Quarterman	1068
Garcia *v.* United States	1007,1075
Garcia Becerra *v.* United States	1075
Garcia-Bustos *v.* United States	1087
Garcia-Cruz *v.* United States	1087
Garcia-Cunanan *v.* United States	1073

Page

Garcia-Gomez *v.* United States 1087
Garcia-Lara *v.* United States 1016
Garcia-Maeda *v.* United States 1046
Garcia-Miranda *v.* United States 1044
Gardner *v.* McKune 1023
Gardner *v.* United States 1073
Garner *v.* United States 1026
Garrison; Skillern *v.* 1078
Garry *v.* McCann 1040
Garth *v.* Buss 1006
Garza *v.* United States 1012,1047,1099
Garza-Reyes *v.* United States 1075
Gastelum-Hernandez *v.* United States 1073
Gatlin *v.* United States 1067
Gattis *v.* Solomon 1072
Gatton; T-Mobile USA, Inc. *v.* 1064
Gaughan *v.* United States 1100
Gautier *v.* Rhode Island 1049
General Motors Corp.; Carden *v.* 1094
George; Adams *v.* 1022
Georgia; Daly *v.* 1039
Georgia; Osborne *v.* 1091
Georgia; Paradise *v.* 1082
Georgia; Strickland *v.* 1062
Georgia; Terry *v.* 1027
Georgia; Walker *v.* 1015
Georgia; Williams *v.* 1004
Gera *v.* Corbett 1070
Geren; Munaf *v.* 674
Geren *v.* Omar 674
German *v.* McNeil 1009,1103
Gervin; Taek Sang Yoon *v.* 1008
Gharbi *v.* United States 1080
Ghee; Michael *v.* 1005
Gibbs *v.* Phelps 1049
Gibson, *In re* 1064
Gibson *v.* United States 1026,1067
Gilcreast *v.* Voorhies 1058
Giles *v.* Wolfenbarger 1039
Gilliam *v.* California 1082
Gilliard *v.* United States 1067
Gilyard *v.* Acevedo 1088
Gilyard *v.* United States 1059
Ginco, *In re* 1030

	Page
Giurbino; Herrera Rivera *v.*	1037
Gladney *v.* United States	1048
Glagola, *In re*	1077
Glass *v.* Lockheed Federal Credit Union	1081
Glaude *v.* United States	1099
Glenmont Hills Associates Privacy World *v.* Montgomery County	1102
Glenn; Metropolitan Life Ins. Co. *v.*	1003
Glosson *v.* Scribner	1084
Golden, *In re*	1053
Gomes Rivas *v.* United States	1045
Gomez *v.* Florida	1027
Gómez-Pérez *v.* Potter	474
Gonzales *v.* United States	1012
Gonzalez *v.* Adams	1082
Gonzalez *v.* Quarterman	1081
Gonzalez *v.* United States	242,1012,1089
Gonzalez Barron *v.* United States	1012
Gonzalez-Carrillo *v.* United States	1088
Gonzalez-Sinsoon *v.* United States	1042
Goodley *v.* Texas	1071
Goodrich, *In re*	1003
Goodwin *v.* Waddington	1023
Gordon *v.* Pennsylvania	1024
Gordon *v.* Perry	1082
Gordon *v.* United States	1073
Gordon *v.* Virginia	1083
Gorman *v.* Consolidated Edison Corp.	1093
Gosnell *v.* Carlton	1068
Gould *v.* Florida Bar	1032
Governor of Ala. *v.* Kennedy	406
Governor of Ala. *v.* Plump	1001
Governor of Ohio; Biros *v.*	1006
Governor of Ohio; Cooey *v.*	1014,1103
Governor of Tex.; Gordon *v.*	1082
Graham *v.* AT&T Mobility, LLC	1032
Graham *v.* McKune	1042
Grant *v.* United States	1012
Grass *v.* United States	1099
Grasso *v.* United States	1099
Gray *v.* McCann	1028
Grayson *v.* Mitchell	1020
Green *v.* Johnson	1076
Green *v.* McNeil	1082
Green *v.* North Seattle Community College	1018

Page

Green *v.* United States 1025,1044,1077,1080,1086
Green *v.* U. S. District Court 1036
Grefer; Exxon Mobil Corp. *v.* 1014
Griffin; Andersen *v.* 1059
Griffin *v.* Hogsten 1044
Griffin Industries, Inc. *v.* Irvin 1004
Group Health Cooperative Inc.; Persik *v.* 1018
Guam; Moses *v.* 1036
Gudalefsky *v.* Pennsylvania Dept. of Transportation 1024
Guillen-Zapata *v.* United States 1026
Guinn *v.* Quarterman 1069
Guinn *v.* Wilkerson 1022
Gulf Bend Center; Arredondo *v.* 1026
Gundy; O'Donnell *v.* 1103
Gunja; Franklin *v.* 1060
Gunn *v.* United States 1089
Guzman *v.* United States 1075
Haden *v.* United States 1012
Hadix, *In re* 1053
Hagen-Porras *v.* United States 1014
Hairston *v.* Lewis 1083
Haley *v.* Missouri 1022
Hall; Crowe *v.* 1007,1103
Hall *v.* Delaware 1010
Hall; Jackson *v.* 1036
Hall; Lynd *v.* 1028
Hall; Miller *v.* 1008
Hamidullah; Ray *v.* 1043
Hamilton *v.* California 1010
Hamlet; Lang *v.* 1038
Hamm *v.* Pennsylvania 1035
Hammett *v.* California 1069
Hampton *v.* Howes 1084
Hannan *v.* MacDonald 1059
Hanna Steel Corp. *v.* Lowery 1080
Harbin, *In re* 1003
Harmon *v.* California 1010
Harper *v.* Pennsylvania 1069
Harrell *v.* United States 1027
Harris, *In re* 1063
Harris *v.* Morrow 1009
Harris; Struck *v.* 1038
Harrison; Heard *v.* 1008
Harrison *v.* Ozmint 1007

Page
Harrison *v.* United States 1077
Hart *v.* United States 1076
Harveston *v.* Mississippi 1040
Harvey *v.* Folino 1071
Hassett *v.* Kearney 1049
Haste *v.* United States 1001
Hastings; Washington *v.* 1086
Haston *v.* McNeil 1083
Hawaii; Kehano *v.* 1091
Hawkins, *In re* 1064
Hawkins *v.* United States 1060
Haws; Hayatullah *v.* 1069
Haws; Rahimi *v.* 1069
Haws; Williams *v.* 1056
Hayatullah *v.* Haws 1069
Hayes *v.* Los Angeles County Alternate Public Defender 1082
Hayes *v.* United States 1089
Hazle Township Zoning Hearing Bd.; Fellin *v.* 1080
Heard *v.* Harrison 1008
Heath *v.* Dallas-Fort Worth International Airport Bd. 1094
Hedgepeth *v.* United States 1026,1104
Hefley *v.* Calumet Park 1103
Heghmann *v.* Rye 1053
Heim *v.* Astrue 1054
Heinle *v.* Conerly 1037
Helling; Lewis *v.* 1056
Helling; Randolph *v.* 1056
Henak; Whitcombe *v.* 1015
Henderson *v.* Bakker 1037
Henderson *v.* United States 1002,1006
Herbert, *In re* 1003,1091
Hernandez *v.* Jones 1019
Hernandez *v.* Texas 1036,1083
Hernandez *v.* United States 1085
Hernandez Gonzalez *v.* Quarterman 1081
Herrera Rivera *v.* Giurbino 1037
Hershfeldt *v.* Schriro 1071
Hess *v.* Quarterman 1071
Hess *v.* United States 1027
Hill *v.* California 1010
Hill; New York *v.* 1048
Himmelreich *v.* United States 1077
Hines; Diestel *v.* 1079
Hin Liong *v.* Mukasey 1058

	Page
Hinojosa-Echavarria *v.* United States	1034
Hoffman *v.* Folino	1083
Hogan; Calderon *v.*	1034
Hogsten; Griffin *v.*	1044
Hogsten; Underwood *v.*	1012,1044
Holanchock; Makas *v.*	1070
Holguin *v.* United States	1013,1087
Holland *v.* Layton	1004
Hollingsworth *v.* United States	1026
Holloman *v.* Florida	1049
Hon Lau *v.* California	1040
Honolulu Police Dept.; Smith *v.*	1037
Hopkins; Advantage Media, LLC *v.*	1054
Hopkins *v.* United States	1100
Horn *v.* Quarterman	1020
Houghton; Tetreault *v.*	1104
Hourani *v.* United States	1047
Houston; Jacob *v.*	1049
Houston; Linh Bao *v.*	1041
Houston; Nixon *v.*	1065
Howard *v.* Michigan Dept. of Corrections	1068
Howell; Cornelius *v.*	1057
Howell *v.* United States	1086
Howes; Hampton *v.*	1084
Howland *v.* Quarterman	1081
Howmedica Osteonics Corp.; Tranquil Prospects, Ltd. *v.*	1094
Hua Dong *v.* Department of Justice	1053
Hubert; Aleman *v.*	1027
Hubler *v.* Douglas County District Court	1041
Huerta-Vallin *v.* United States	1012
Huffman *v.* Quarterman	1068
Hughes *v.* United States	1025
Humphrey *v.* Onondaga County Sheriff's Dept.	1082
Humphries; CBOCS West, Inc. *v.*	442
Hunter *v.* Texas	1068
Hunter *v.* United States	1043,1086
Huntley *v.* McGrath	1072
Hurley Medical Center; Mills *v.*	1062
Hurtado *v.* United States	1094
Huynh *v.* United States	1100
Hyche *v.* Illinois Prisoner Review Bd.	1095
Hyman; Denton *v.*	1003
Hyundai Motor Co.; Diaz-Ramos *v.*	1018
Ibarra *v.* Texas	1055

Page
Ice; Oregon *v.* 1030
Illinois; Brown *v.* 1086
Illinois; Butler *v.* 1020
Illinois; Conway *v.* 1021
Illinois; Crawford *v.* 1098
Illinois; Jackson *v.* 1089
Illinois; Ojeda *v.* 1021
Illinois; Orosco *v.* 1020
Illinois Dept. of Corrections; Ruckman *v.* 1040
Illinois Dept. of Employment Security; Martin *v.* 1085
Illinois Dept. of Revenue; MeadWestvaco Corp. *v.* 16
Illinois Prisoner Review Bd.; Hyche *v.* 1095
Imler *v.* Central Mut. Ins. Co. 1069
Incumaa *v.* Ozmint 1007
Indiana; Kubsch *v.* 1067
Indiana; Stephens *v.* 1039
Indiana Democratic Party *v.* Rokita 181
Indiana Secretary of State; Indiana Democratic Party *v.* 181
Indivos Corp.; Excel Innovations, Inc. *v.* 1017
Inman *v.* South Carolina 1094
Innes *v.* United States 1074
In re. See name of party.
Internal Revenue Service; Murphy *v.* 1004
Internal Revenue Service; Stephen *v.* 1029
IpVenture, Inc.; ProStar Computer, Inc. *v.* 1094
Iraq *v.* Beaty 1063
Irizarry *v.* United States 708
Irvin; Griffin Industries, Inc. *v.* 1004
Irvin *v.* United States 1100
Irving *v.* United States 1060
Islas *v.* United States 1048
Iwanejko *v.* Cohen & Grigsby, P. C. 1030
Jack *v.* Roberts 1097
Jackson *v.* Hall 1036
Jackson *v.* Illinois 1089
Jackson *v.* Minnesota 1019
Jackson *v.* New York 1011
Jackson *v.* Norris 1096
Jackson; Philip Morris USA Inc. *v.* 1094
Jackson *v.* Smith 1037
Jackson *v.* United States 1060,1072,1074
Jackson State Univ.; Washington *v.* 1024
Jacob *v.* Houston 1049
Jamison, *In re* 1017

	Page
Jasper *v.* United States	1072
Jenkins; Evans *v.*	1033
Jenkins; Moore *v.*	1021
Jenkins *v.* Suncoast Construction Group	1009
Jenkins *v.* United States	1062
Jewell *v.* Life Ins. Co. of North America	1079
Jimenez *v.* United States	1100
Jimenez-Sandoval *v.* United States	1044
Johanns; Kinder Canal Co. *v.*	1052
John Crane, Inc. *v.* Oney	1005
Johnson; Albert *v.*	1055
Johnson; Bea *v.*	1048
Johnson; Blount *v.*	1023
Johnson *v.* Board of Bar Overseers of Supreme Jud. Ct. of Mass.	1010
Johnson; Brown *v.*	1056
Johnson; Cherry *v.*	1009
Johnson; Colosi *v.*	1085
Johnson; Cross *v.*	1011
Johnson; Dawson *v.*	1040
Johnson *v.* Durison	1065
Johnson; Emmett *v.*	1051
Johnson *v.* Florida	1007
Johnson *v.* Gadson	1049,1053
Johnson; Green *v.*	1076
Johnson *v.* Seckler	1097
Johnson; Spears *v.*	1049
Johnson *v.* State Attorney, Sumter County	1040
Johnson *v.* Supreme Court of Kan.	1009
Johnson *v.* Texas	1085
Johnson; Thomas *v.*	1010
Johnson *v.* United States	1013,1099,1100
Johnson City; Dyno *v.*	1103
Jones; Bixby *v.*	1070
Jones; Hernandez *v.*	1019
Jones *v.* Michigan	1095
Jones *v.* Nebraska	1077
Jones; Parker *v.*	1082
Jones *v.* Quarterman	1008,1017
Jones *v.* Runnels	1011
Jones *v.* Schriro	1085
Jones; Tinsley *v.*	1036
Jones; Truly *v.*	1099
Jones *v.* United States	1001,1026,1042,1060,1061,1088
Joost *v.* Apker	1074

	Page
Jou *v.* Argonaut Ins. Co.	1053
Jove-Reyes *v.* United States	1060
Juarez-Duarte *v.* United States	1043
Judge, Dist. Court of Okla., 5th Judicial Dist.; Lawrence *v.*	1027
Junell; Chisum *v.*	1041
Kabushiki Co.; Festo Corp. *v.*	1093
Kachimbo *v.* United States	1045
Kane; Bakke *v.*	1083
Kansas *v.* Colorado	1092
Kansas; Davis *v.*	1059
Karass; Locke *v.*	1078
Karpova *v.* Paulson	1054
Kearney; Hassett *v.*	1049
Kearns *v.* Comba	1005
Kehano *v.* Hawaii	1091
Kelly; Bell *v.*	1031
Kelly; Scott *v.*	1083
Kelly; Tinkham *v.*	1103
Kemna; Echols *v.*	1041
Kemna; Turner *v.*	1085
Kendrick *v.* McNeil	1058
Kennedy; Riley *v.*	406
Kennedy *v.* United States	1074
Kenon *v.* Florida	1103
Kentucky; Campbell *v.*	1021
Kentucky; Yell *v.*	1011
Khianthalat *v.* Florida	1072
Khong Nguyen *v.* United States	1099
Kilbourne *v.* Stillwater	1039
Kilgroe *v.* National Transportation Safety Bd.	1094
Kilough *v.* United States	1088
Kim *v.* Mukasey	1031
Kinder Canal Co. *v.* Johanns	1052
King; Adonai-Adoni *v.*	1084
King; Lee *v.*	1040
King *v.* United States	1075
King; Winding *v.*	1041
Kingston; Parrilla *v.*	1086
Kiper *v.* Nevada	1010
Kirschenman *v.* United States	1045
Kittredge *v.* United States	1029
Klein; Miles *v.*	1005
Kleinman *v.* Commissioner	1076
Kliment; Vose *v.*	1064

Page

Knight *v.* Mississippi 1057
Knowles; Childress *v.* 1096
Koenig *v.* Dormire 1049
Koher *v.* Caudill 1058
Kohser *v.* Merth 1096
Konig *v.* State Bar of Cal. 1079
Konteh; Adkins *v.* 1040
Koren; Barrett *v.* 1066
Kubsch *v.* Indiana 1067
Kuroda *v.* Bell 1097
Kyong Kim *v.* Mukasey 1031
Lafler; Wright *v.* 1069
Lagoye *v.* Mukasey 1038
Lancaster *v.* Quarterman 1062
Lancaster Jewish Community Center Assn.; LeBoon *v.* 1004
Lane *v.* Burns 1072
Lang *v.* Hamlet 1038
Langford *v.* Almager 1037
La Plata R–II School Dist.; McClaskey *v.* 1003
LaPlume *v.* Massachusetts Dept. of Social Services 1080
Lara-Lopez *v.* United States 1026
Lara-Morales *v.* United States 1088
Larios-Aguirre *v.* United States 1088
Larosa's International Fuel Co. *v.* United States 1079
Laster; T-Mobile USA, Inc. *v.* 1064
Lau *v.* California 1040
Lauro *v.* Patrick 1070
Law *v.* Wesley 1041
Lawler; Andrews *v.* 1023
Lawler; Barnhart *v.* 1038
Lawler; Davis *v.* 1097
Lawler; Wheeler *v.* 1049
Lawrence *v.* McCall 1027
Lawrence *v.* Texas 1007
Layton; Holland *v.* 1004
LeBoon *v.* Lancaster Jewish Community Center Assn. 1004
Ledcke *v.* United States 1006
Ledezma-Esparza *v.* United States 1012
Lee *v.* Department of Veterans Affairs 1058
Lee *v.* King 1040
Lehman Brothers Bank, FSB *v.* State Bank Comm'r 1018
Lentworth *v.* Potter 1059
Leonard *v.* United States 1047
Leon-Centeno *v.* United States 1012

Page

Lerner *v.* Lerner 1069
Levario-Hermosillo *v.* United States 1087
Levin; Lovell *v.* 1033
Levine *v.* United States 1046
Levy *v.* Uttecht 1024
Lewis *v.* California 1016
Lewis; Falls *v.* 1057
Lewis; Hairston *v.* 1083
Lewis *v.* Helling 1056
Lewis *v.* McNeil 1023
Lewis *v.* United States 1088
Lewis *v.* Virginia 1056
Lewis Law Firm, PC; Froelich *v.* 1048
LG Electronics, Inc.; Quanta Computer, Inc. *v.* 617
Liao *v.* Quidachay 1070
Life Ins. Co. of North America; Jewell *v.* 1079
Lightbourne *v.* McCollum 1059
Lighthouse Institute for Evangelism, Inc. *v.* Long Branch 1065
Lima *v.* Florida 1022
Linh Bao *v.* Houston 1041
Linton *v.* California 1011
Liong *v.* Mukasey 1058
Lipscomb *v.* Ward 1084
Little *v.* Wolfenbarger 1039
Living Water Church of God *v.* Charter Township of Meridian .. 1093
Lo *v.* Endicott 1049
Locke *v.* Karass 1078
Lockheed Federal Credit Union; Glass *v.* 1081
Lockheed Martin; Barrington *v.* 1095
Lockheed Martin Corp.; National Casualty Co. *v.* 1017
Lollar *v.* DTR Tenn., Inc. 1062
Lomaz *v.* United States 1034
Lombardelli *v.* Scribner 1008
Long; Oliver *v.* 1036
Long Branch; Lighthouse Institute for Evangelism, Inc. *v.* 1065
Lopez *v.* Brigano 1007
Lopez-DeLeon *v.* United States 1099
Lopez-Martinez *v.* United States 1075
Los Angeles County Alternate Public Defender; Hayes *v.* 1082
Louisiana; Davis *v.* 1096
Louisiana; Menard *v.* 1070
Lousley *v.* United States 1042
Love *v.* Roberts 1077
Love *v.* United States 1026

Page
Lovell *v.* Levin 1033
Lowery; Hanna Steel Corp. *v.* 1080
Lowery *v.* United States 1055
Luckette *v.* Astrue 1030
Lugo *v.* United States 1047
Lugo Bueno *v.* United States 1061
Lundquist; Cohens *v.* 1098
Lundquist; Franklin *v.* 1019
Lutz; Bakhtiari *v.* 1033
Lynch; Spuck *v.* 1062
Lynd *v.* Hall 1028
Lyons; Bell *v.* 1049
Lyttle *v.* United States 1087
MacDonald; Hannan *v.* 1059
Macias-Valencia *v.* United States 1026
Mackie *v.* Sabol 1090
Magers *v.* United States 1088
Maher *v.* Maine 1058
Maine; Maher *v.* 1058
Mainstreet Organization of Realtors *v.* Calumet City 1079
Major League Baseball Media *v.* C. B. C. Distribution & Mktg. .. 1090
Makas *v.* Holanchock 1070
Malcolm *v.* United States 1046
Maldonado *v.* Yeingst 1066
Manago *v.* Florida 1006
Mann *v.* Tennessee 1057
Maracalin *v.* United States 1024
Mardis, *In re* 1028
Marion County Election Bd.; Crawford *v.* 181
Markley *v.* McBride 1085
Marmolejo-Sanchez *v.* United States 1029
Marro *v.* Virginia Electric & Power Co. 1066
Marsh *v.* United States 1088
Marshall; Tavarez *v.* 1098
Martin; Bush *v.* 1084
Martin *v.* California 1038,1082
Martin *v.* Illinois Dept. of Employment Security 1085
Martin *v.* Mooney 1082
Martin *v.* Ohio 1011
Martinez; Stroman Realty, Inc. *v.* 1065
Martinez *v.* United States 1046,1100
Martinez-Corpus *v.* United States 1029
Martinez-Reyes *v.* United States 1002
Martinez Trujillo *v.* Quarterman 1079

Page
Martinez-Ventura *v.* United States 1061
Martino; Anderson *v.* 1009
Maryland; Wade *v.* 1040
Mason *v.* Washington 1035
Massachusetts; Cousin *v.* 1007
Massachusetts; Delacruz *v.* 1059
Massachusetts; Mendes *v.* 1005
Massachusetts Dept. of Social Services; LaPlume *v.* 1080
Masto; Plumlee *v.* 1085
Mata-Barrera *v.* United States 1087
Mathai; Michowski *v.* 1097
Mathis *v.* Florida 1040
Mathis *v.* United States 1043
Mathis *v.* U. S. District Court 1103
Mathis *v.* Wynder 1037
Mathison *v.* United States 1089
Matthews *v.* United States 1076
Mayer; Sammann *v.* 1033
Mayolo *v.* McNeil 1021
McAteer; Silverleaf Resorts, Inc. *v.* 1080
McBride; Markley *v.* 1085
McCabe *v.* Fortner 1023
McCain *v.* Mississippi 1056
McCall; Lawrence *v.* 1027
McCann; Bahrs *v.* 1045
McCann; Garry *v.* 1040
McCann; Gray *v.* 1028
McCann; Tyler *v.* 1050
McClaskey *v.* La Plata R–II School Dist. 1003
McCollum; Lightbourne *v.* 1059
McCollum; Patterson *v.* 1056
McCoy *v.* United States 1001,1061
McCreary *v.* United States 1102
McCullough *v.* United States 1098
McDaniel; Collier *v.* 1057
McDaniel; Parra *v.* 1058
McDaniel; Reyes *v.* 1072
McDaniel *v.* United States 1024
McGee *v.* United States 1044
McGehee *v.* United States 1060
McGill *v.* United States 1043
McGowan *v.* Worthington 1025
McGrath; Huntley *v.* 1072
McIntyre-Handy *v.* APAC Customer Services, Inc. 1030

Page
McKee; Williams *v.* 1096
McKeeman; Fuller *v.* 1082
McKune; Gardner *v.* 1023
McKune; Graham *v.* 1042
McLear *v.* West Virginia State Tax Comm'r 1054
McNair; Feurtado *v.* 1029
McNeil; Balzarotti *v.* 1103
McNeil; Brookins *v.* 1036
McNeil; Fordham *v.* 1083
McNeil; Franqui *v.* 1040
McNeil; German *v.* 1009,1103
McNeil; Green *v.* 1082
McNeil; Haston *v.* 1083
McNeil; Kendrick *v.* 1058
McNeil; Lewis *v.* 1023
McNeil; Mayolo *v.* 1021
McNeil; Morley *v.* 1007
McNeil; Newland *v.* 1077
McNeil; San Pedro *v.* 1023
McNeil; Steele *v.* 1030
McNeil; Walters *v.* 1040
McNeil; Weaver *v.* 1096
McNeill, *In re* 1064
McRae *v.* United States 1060
Meads *v.* Cain 1057
MeadWestvaco Calmar, Inc. *v.* Arminak & Associates, Inc. 1102
MeadWestvaco Corp. *v.* Illinois Dept. of Revenue 16
Medallin *v.* United States 1089
Medallin-Herrera *v.* United States 1089
Medical Transportation Management Corp. *v.* Commissioner 1034
Medina *v.* California 1039
Medina-Flores *v.* United States 1045
Meehan; Morrow *v.* 1019
Meekins *v.* California 1023
Membreno *v.* United States 1087
Menard *v.* Louisiana 1070
Mendes *v.* Massachusetts 1005
Mendez *v.* United States 1044,1087
Mendez-Gonzalez *v.* United States 1087
Mendez-Perez *v.* United States 1087
Mendoza-Lares *v.* Arizona 1010
Mendoza-Powers; Miller *v.* 1095
Merck & Co.; Apotex Corp. *v.* 1090
Merit Systems Protection Bd.; Shelborne *v.* 1041

Page
Merriweather *v.* Fredrick 1008
Merth; Kohser *v.* 1096
Messier *v.* United States 1013
Metoyer; Screen Actors Guild, Inc. *v.* 1049
Metropolitan Govt. of Nashville & Davidson County; Crawford *v.* 1078
Metropolitan Govt. of Nashville & Davidson County; Peete *v.* ... 1032
Metropolitan Life Ins. Co. *v.* Glenn 1003
Metterau; Atwell *v.* 1078
Meza-Barunda *v.* United States 1087
Meza-Borunda *v.* United States 1087
Miami Beach; Perez *v.* 1018
Michael *v.* Ghee 1005
Michigan; Bernard *v.* 1055
Michigan; Childs *v.* 1036
Michigan; Cody *v.* 1009
Michigan; Jones *v.* 1095
Michigan; Page *v.* 1084
Michigan; Riker *v.* 1081
Michigan; Smith *v.* 1081
Michigan; Sueing *v.* 1027
Michigan; Tesley *v.* 1036
Michigan; Thomas *v.* 1039
Michigan Dept. of Corrections; Bazzetta *v.* 1020
Michigan Dept. of Corrections; Howard *v.* 1068
Michigan Dept. of Corrections; Ward *v.* 1006
Michigan Dept. of Labor; Ware *v.* 1070
Michowski *v.* Mathai 1097
Mickens *v.* United States 1006
Microsoft Corp.; Rechanik *v.* 1048
Microsoft Corp. *v.* z4 Technologies, Inc. 1028
Middle Paxton Township; Angino *v.* 1093
Middlesex County Office of Prosecutor; Wiltz *v.* 1062
Middleton *v.* Roper 1009
Mikulski; Centerior Energy Corp. *v.* 1031
Milbourne *v.* United States 1024
Miles *v.* Klein 1005
Miller *v.* Cain 1007
Miller *v.* Hall 1008
Miller *v.* Mendoza-Powers 1095
Miller *v.* United States 1001,1002
Mills *v.* Florida 1098
Mills *v.* Hurley Medical Center 1062
Milpitas; Sowards *v.* 1032
Milton *v.* Peake 1028

	Page
Minnesota; Jackson *v.*	1019
Minnfee *v.* Quarterman	1103
Mirarchi, *In re*	1016
Mireles-Flores *v.* United States	1074
Mississippi; Berry *v.*	1063
Mississippi; Curlee *v.*	1095
Mississippi; Edwards *v.*	1095
Mississippi; Harveston *v.*	1040
Mississippi; Knight *v.*	1057
Mississippi; McCain *v.*	1056
Mississippi; Quang Thanh Tran *v.*	1054
Mississippi; Tarvin *v.*	1035
Missouri; Haley *v.*	1022
Mitchell, *In re*	1015,1064
Mitchell; Grayson *v.*	1020
Mitchell *v.* United States	1094,1101
Mitchell *v.* Watkins	1098
Molina *v.* United States	1012
Monroe; Thomas *v.*	1020
Monsanto Co. *v.* Syngenta Seeds, Inc.	1077
Montesino *v.* Florida	1057
Montgomery; Calloway *v.*	1066
Montgomery County; Glenmont Hills Associates Privacy World *v.*	1102
Montonyo *v.* United States	1046
Moon *v.* United States	1062
Mooney; Martin *v.*	1082
Moore; Briggs *v.*	1057
Moore; Edger *v.*	1024
Moore *v.* Jenkins	1021
Moore *v.* North Carolina	1039
Moore; Rittner *v.*	1068
Moore *v.* Terrell	1055
Moore *v.* Texas	1070
Moore; Virginia *v.*	164
Mora; Viray *v.*	1002,1078
Morales *v.* United States	1092
Morales *v.* Wynder	1096
Morales-Rivera *v.* United States	1044
Moran *v.* United States	1035
Moreno-Gonzalez *v.* United States	1091
Morgan; Andreola *v.*	1011
Morgan *v.* Bureau of Alcohol, Tobacco, Firearms & Explosives	1033
Morganfield *v.* United States	1067
Morley *v.* McNeil	1007

Page

Morris *v.* United States 1001,1010,1065
Morrison *v.* Chao 1005
Morrow; Harris *v.* 1009
Morrow *v.* Meehan 1019
Moses *v.* Guam 1036
Motes; Brauninger *v.* 1065
Moton *v.* California 1058
Moya-Mena *v.* United States 1075
Mozes *v.* Mukasey 1084
Mudholkar *v.* University of Rochester 1080
Muhammad *v.* Sisto 1008
Mukasey; Awad *v.* 1055
Mukasey; Bintzler *v.* 1013
Mukasey; Dalomba Fontes *v.* 1055
Mukasey; Debeato *v.* 1067
Mukasey; Demjanjuk *v.* 1061
Mukasey; Ejedawe *v.* 1097
Mukasey; Lagoye *v.* 1038
Mukasey; Mozes *v.* 1084
Mukasey; Ndong-Ntoutoum *v.* 1014
Mukasey; Oghenesoro *v.* 1009
Mukasey; Peguero-Cruz *v.* 1055
Mukasey; Perdomo *v.* 1033
Mukasey; Qazza *v.* 1062
Mukasey; Saravia-Paguada *v.* 1064
Mukasey; Shafiq *v.* 1033
Mukasey; Tae Kyong Kim *v.* 1031
Mukasey; That Hin Liong *v.* 1058
Mukasey; Volkova *v.* 1080
Mukasey; Yi Qiang Yang *v.* 1031
Mukasey; Zamora *v.* 1004
Mullin; Campbell *v.* 1022
Munaf *v.* Geren 674
Munley; Radocesky *v.* 1041
Murillo Kachimbo *v.* United States 1045
Murphy *v.* Denny 1010
Murphy *v.* Evans 1096
Murphy *v.* Internal Revenue Service 1004
Murray *v.* Edwards County Sheriff's Dept. 1035
Murray *v.* Souter 1052
Murray County; R and J Murray, LLC *v.* 1053
Musselman *v.* Nitchman 1005
Muttart *v.* Ohio 1055
Mutuc *v.* United States 1019

	Page
Myers *v.* California	1056
Nalley; Queen *v.*	1009
National Casualty Co. *v.* Lockheed Martin Corp.	1017
National Transportation Safety Bd.; Kilgroe *v.*	1094
National Transportation Safety Bd.; Talon *v.*	1015
NBC Universal, Inc.; Ardito *v.*	1005
Ndong-Ntoutoum *v.* Mukasey	1014
Nealon, *In re*	1017,1104
Nebraska; Jones *v.*	1077
Nedea, *In re*	1030
Nelson *v.* Boston Police Dept.	1010
Ness *v.* United States	1091
Nettles; Valentine *v.*	1039
Nevada; Kiper *v.*	1010
Nevada; Stayton *v.*	1021
Newland *v.* McNeil	1077
Newsome *v.* West Virginia	1098
Newson *v.* Bowersox	1059
Newson *v.* United States	1074
New York; Flemming *v.*	1009
New York *v.* Hill	1048
New York; Jackson *v.*	1011
New York; Rossi *v.*	1058
New York; Windley *v.*	1024
New York City; Banushi *v.*	1032
New York City; Prendergast *v.*	1066
New York City; Spells *v.*	1025
New York City Housing Authority; Petties *v.*	1098
Nguyen *v.* United States	1099
Niblock *v.* United States	1101
Nichols *v.* California	1098
Nicklasson *v.* Roper	1007
Nish; Pridgen *v.*	1049
Nitchman; Musselman *v.*	1005
Nixon *v.* Houston	1065
Nnaji *v.* United States	1103
Norris; Clenney *v.*	1022
Norris; Jackson *v.*	1096
North Carolina; Beltran *v.*	1091
North Carolina; Moore *v.*	1039
North Carolina; Patton *v.*	1057
North Carolina; Rankins *v.*	1069
North Carolina; Robinson *v.*	1015
North Carolina; Theer *v.*	1055

Page
North Dakota; Darby *v.* 1058
North Dakota; Thompson *v.* 1036
North Seattle Community College; Green *v.* 1018
Nowak *v.* Transportation Agreement of Consol. School Dist. 47 .. 1054
Ntsebeza; American Isuzu Motors, Inc. *v.* 1028
Nucleonics, Inc. *v.* Benitec Australia, Ltd. 1014
Nunez *v.* Oregon 1069
Nunez *v.* United States 1047
Nunez Villegas *v.* United States 1102
Nunez-Virraizabal *v.* United States 1091
Nunn; Sanders *v.* 1006
O'Brien; Gagne *v.* 1058
Ochoa Canales *v.* Quarterman 1027
O'Donnell *v.* Gundy 1103
Office of Personnel Management; Arenal *v.* 1043
Oghenesoro *v.* Mukasey 1009
Ogman *v.* United States 1089
Ohio; Babos *v.* 1008
Ohio; Frazier *v.* 1015
Ohio; Martin *v.* 1011
Ohio; Muttart *v.* 1055
Ohio; Schaub *v.* 1011
Ohio; Velasquez *v.* 1011
Ojeda *v.* Illinois 1021
Oklahoma; Brown *v.* 1020
Oklahoma; Cleveland *v.* 1027
Oklahoma; Cole *v.* 1055
Oklahoma; White *v.* 1083
Olds *v.* Purkett 1023
Oliver *v.* Long 1036
Olivier *v.* United States 1089
Olmedo-Salinas *v.* United States 1043
Olsen *v.* Virginia 1038
Omar; Geren *v.* 674
Oney; John Crane, Inc. *v.* 1005
Onondaga County Sheriff's Dept.; Humphrey *v.* 1082
Oregon *v.* Ice 1030
Oregon; Nunez *v.* 1069
Oregon Dept. of Agriculture; Engquist *v.* 591
Oregon Judicial Dept.; De Jesus Estacio *v.* 1103
Orient Mineral Co. *v.* Bank of China 1079
Ormco Corp. *v.* Align Technology, Inc. 1032
Orosco *v.* Illinois 1020
Ortiz *v.* Blevins 1096

	Page
Ortiz *v.* Quarterman	1035
Ortiz; Shanklin *v.*	1042
Osamor *v.* United States	1090
Osborne, *In re*	1091
Osborne *v.* Georgia	1091
Osborne *v.* United States	1075
Otterson *v.* United States	1045
Owens *v.* United States	1086
Oz Gas, Ltd. *v.* Warren Area School Dist.	1065
Ozmint; Harrison *v.*	1007
Ozmint; Incumaa *v.*	1007
Page *v.* Michigan	1084
Page *v.* St. Lawrence	1037
Paice LLC; Toyota Motor Corp. *v.*	1032
Palacio *v.* United States	1072
Panorama Records, Inc. *v.* Zomba Enterprises, Inc.	1032
Paradise *v.* Georgia	1082
Parker *v.* Chicago Transit Authority	1033
Parker *v.* Jones	1082
Parmalee *v.* United States	1087
Parmelee *v.* United States	1087
Parra *v.* McDaniel	1058
Parrilla *v.* Kingston	1086
Patel *v.* United States	1087
Patrick; Fielding *v.*	1022
Patrick; Lauro *v.*	1070
Patrick *v.* United States	1067
Patridge *v.* United States	1062
Patterson *v.* McCollum	1056
Patterson *v.* United States	1089
Patton *v.* North Carolina	1057
Patton; Wingfield *v.*	1025
Paulson; Karpova *v.*	1054
Paulson; Poll *v.*	1054
Peake; Bonner *v.*	1005
Peake; Flores *v.*	1097
Peake; Milton *v.*	1028
Pearce *v.* United States	1101
Peet *v.* Detroit	1032
Peete *v.* Metropolitan Government of Nashville and Davidson Cty.	1032
Peguero-Cruz *v.* Mukasey	1055
Pelletier *v.* Watson	1098
Pena *v.* United States	1099
Pena-Perete *v.* United States	1042

	Page
Penate-Pinto *v.* United States	1089
Pender *v.* United States	1025
Penland *v.* United States	1059
Penner; Westerfield *v.*	1021
Pennsylvania; Baynes *v.*	1023
Pennsylvania; Bryant *v.*	1022
Pennsylvania; Champney *v.*	1067
Pennsylvania; Cousar *v.*	1035
Pennsylvania; Cuesta *v.*	1079
Pennsylvania; Friend *v.*	1068
Pennsylvania; Gordon *v.*	1024
Pennsylvania; Hamm *v.*	1035
Pennsylvania; Harper *v.*	1069
Pennsylvania; Santiago *v.*	1021
Pennsylvania; Sloan *v.*	1024
Pennsylvania Dept. of Transportation; Gudalefsky *v.*	1024
Peppers *v.* United States	1086
Pequeno *v.* Schmidt	1005
Perdomo *v.* Mukasey	1033
Perea-Martinez *v.* United States	1087
Perez *v.* Miami Beach	1018
Perez Castro *v.* United States	1075
Perez Mendez *v.* United States	1087
Perfect 10, Inc. *v.* Visa International Service Assn.	1079
Perkins *v.* Quarterman	1067
Perry; Gordon *v.*	1082
Persik *v.* Group Health Cooperative Inc.	1018
Peters; Arizpe *v.*	1019
Petties *v.* New York City Housing Authority	1098
Pettijohn *v.* Bartos	1056
Pfeiffer; Featherstone *v.*	1003
Phelps; Gibbs *v.*	1049
Philip Morris USA Inc. *v.* Jackson	1094
Philip Morris USA Inc. *v.* Williams	1093
Philippines *v.* Pimentel	851
Phillips *v.* United States	1045,1047
Phoenix Bond & Indemnity Co.; Bridge *v.*	639
Picou *v.* Cain	1022
Pierce *v.* Department of Air Force	1019
Pimentel; Republic of Philippines *v.*	851
Pina-Fernandez *v.* United States	1087
Pineda *v.* CHW Central Cal. Mercy Hospital	1040
Placencia-Medina *v.* United States	1061
Plano; Cooper *v.*	1041

	Page
Pliego-Duarte *v.* United States	1099
Plumlee *v.* Cortez Masto	1085
Plump; Riley *v.*	1001
Poll *v.* Paulson	1054
Portland General Electric Co. *v.* Public Power Council	1093
Portocarrero Cana *v.* United States	1045
Postmaster General; Benson *v.*	1103
Postmaster General; Gómez-Pérez *v.*	474
Potter; Benson *v.*	1103
Potter; Gómez-Pérez *v.*	474
Potter; Lentworth *v.*	1059
Powers; Bettis *v.*	1084
Prather *v.* Texas	1049
Prendergast *v.* New York City	1066
Prescod *v.* United States	1013
President of U. S.; Boumediene *v.*	723
Price *v.* United States	1089
Pridgen *v.* Nish	1049
Prison Health Services; Adonai-Adoni *v.*	1084
ProStar Computer, Inc. *v.* IpVenture, Inc.	1094
Prudden; Davis *v.*	1020
Public Power Council; Portland General Electric Co. *v.*	1093
PuriTec *v.* California	1005
Purkett; Olds *v.*	1023
Qazi *v.* United States	1101
Qazza *v.* Mukasey	1062
Qiang Yang *v.* Mukasey	1031
Quang Thanh Tran *v.* Mississippi	1054
Quanta Computer, Inc. *v.* LG Electronics, Inc.	617
Quarterman; Bishop *v.*	1039
Quarterman; Bower *v.*	1006
Quarterman; Caldwell *v.*	1081
Quarterman; Casillas *v.*	1081
Quarterman; Charles *v.*	1050
Quarterman; Clay *v.*	1077
Quarterman; Cooper *v.*	1035
Quarterman; Dooley *v.*	1021
Quarterman; England *v.*	1034
Quarterman; Fennell *v.*	1083
Quarterman; Garcia *v.*	1068
Quarterman; Guinn *v.*	1069
Quarterman; Hernandez Gonzalez *v.*	1081
Quarterman; Hess *v.*	1071
Quarterman; Horn *v.*	1020

Page
Quarterman; Howland *v.* 1081
Quarterman; Huffman *v.* 1068
Quarterman; Jones *v.* 1008,1017
Quarterman; Lancaster *v.* 1062
Quarterman; Martinez Trujillo *v.* 1079
Quarterman; Minnfee *v.* 1103
Quarterman; Ochoa Canales *v.* 1027
Quarterman; Ortiz *v.* 1035
Quarterman; Perkins *v.* 1067
Quarterman; Rosales *v.* 1036
Quarterman; Sirmans *v.* 1070
Quarterman; Smith *v.* 1103
Quarterman; Taylor *v.* 1008,1077
Quarterman; Thomas *v.* 1037
Quarterman; Warren *v.* 1039
Quarterman; Washington *v.* 1057
Quarzenski *v.* Wisconsin 1019
Queen *v.* Nalley 1009
Quidachay; Wanxia Liao *v.* 1070
Quigley; Scott *v.* 1032
Radian Guaranty, Inc. *v.* Whitfield 1091
Radocesky *v.* Munley 1041
Raemisch; Bintzler *v.* 1061
Ragland; Brillhart *v.* 1068
Rahimi *v.* Haws 1069
Raimondo *v.* Delecke Welding, Inc. 1017
Ramirez, *In re* 1003
Ramirez *v.* Arizona 1056
Ramirez *v.* Stacks 1070
Ramirez *v.* United States 1073,1100
Ramirez Rivera *v.* United States 1074
Ramos *v.* United States 1102
Ramsey *v.* Stansberry 1099
R and J Murray, LLC *v.* Murray County 1053
Randolph *v.* Helling 1056
Rankins *v.* North Carolina 1069
Ray *v.* Hamidullah 1043
Raynor *v.* U. S. District Court 1065
Raysor; Rolle *v.* 1069
Raza, *In re* 1031
Rechanik *v.* Microsoft Corp. 1048
Recinos-Duarte *v.* United States 1102
Redevelopment Authority of Philadelphia; Alston *v.* 1048
Reed *v.* Cocke County Juvenile Court 1020

	Page
Rees; Baze *v.*	35
Reese *v.* Cain	1096
Reeves *v.* Texas	1009
Regalado Cuellar *v.* United States	550
Rehman *v.* Board of Immigration Appeals	1040
Reid *v.* United States	1075
Reigle *v.* United States	1060
Republic of Iraq *v.* Beaty	1063
Republic of Philippines *v.* Pimentel	851
Ressam; United States *v.*	272
Reyes *v.* McDaniel	1072
Reyes *v.* Tovar	1103
Reyes *v.* United States	1087
Reyes-Quintanilla *v.* United States	1087
Reynolds *v.* Bagley	1097
Rhoades *v.* United States	1019
Rhode Island; Gautier *v.*	1049
Rhodes *v.* Texas	1009
Rhodes *v.* United States	1100
Rice *v.* United States	1012
Richards *v.* Duke Univ.	1048
Richards *v.* Waukegan	1070
Richardson *v.* United States	1013,1072,1075
Richlin Security Service Co. *v.* Chertoff	571
Rigmaiden *v.* United States	1055
Riker *v.* Michigan	1081
Riley *v.* Kennedy	406
Riley *v.* Plump	1001
Riley *v.* Supreme Court of La.	1022
Rios *v.* United States	1060
Rittner *v.* Moore	1068
Rivas *v.* United States	1045
Rivera, *In re*	1027,1064
Rivera; Brown *v.*	1047
Rivera *v.* Giurbino	1037
Rivera *v.* Snow	1054
Rivera *v.* United States	1074
Rivera-Gonzalez *v.* United States	1080
R. M. Investment Co. *v.* U. S. Forest Service	1054
Roach *v.* United States	1006
Roberts; Jack *v.*	1097
Roberts; Love *v.*	1077
Robertson *v.* United States	1060
Robinson *v.* Arizona	1097

Page
Robinson *v.* North Carolina 1015
Robinson *v.* United States 1013,1101
Robles *v.* Bosch 1015
Rodriguez *v.* Florida 1071
Rodriguez *v.* United States 1012,1088
Rodriguez-Aguirre *v.* United States 1073
Rodriguez-Duran *v.* United States 1088
Rodriguez-Izaguirre *v.* United States 1029
Rodriguez-Mejia *v.* United States 1060
Rodriguez-Orozco *v.* United States 1088
Rodriguez-Rios *v.* United States 1088
Rodriguez Villafuerte *v.* United States 1075
Rodriquez; United States *v.* 377
Rogers *v.* United States 1046
Rohner *v.* California 1037
Rojas-Garcia *v.* United States 1075
Rokita; Indiana Democratic Party *v.* 181
Roland *v.* Scribner 1071
Rolle *v.* Raysor 1069
Roman *v.* Roman 1048
Romero-Hernandez *v.* United States 1029,1067
Ronquillo *v.* United States 1045
Roper; Bell-Bey *v.* 1035
Roper; Franklin *v.* 1067
Roper; Middleton *v.* 1009
Roper; Nicklasson *v.* 1007
Rosales *v.* Quarterman 1036
Rosales *v.* United States 1095
Rosario Robles *v.* Bosch 1015
Rose, *In re* 1017
Rosenruist-Gestao E Servicos LDA *v.* Virgin Enterprises Ltd. .. 1065
Ross *v.* United States 1025
Rossi *v.* New York 1058
Roswell; Zaidi *v.* 1095
Roundtree *v.* United States 1011
Roussel; Daniel *v.* 1023
Royal *v.* Durison 1065
Rozum; Chambers *v.* 1008
Rozum; Van Tassel *v.* 1085
Ruckman *v.* Illinois Dept. of Corrections 1040
Ruff *v.* Brunsman 1038
Ruiz-Ochoa *v.* United States 1075
Runnels; Chavez *v.* 1035
Runnels; Jones *v.* 1011

	Page
Rutkoske *v.* United States	1060
Ryan; Secrest *v.*	1068
Rye; Heghmann *v.*	1053
Sabol; Mackie *v.*	1090
Saenz-Rivera *v.* United States	1074
Saint-Gobain Calmar, Inc. *v.* Arminak & Associates, Inc.	1102
St. John's United Church of Christ *v.* Chicago	1032
St. Lawrence; Page *v.*	1037
St. Louis *v.* Delaware	1027
Salas-Cardenas *v.* United States	1046
Salas-Hernandez *v.* United States	1089
Salazar-Lopez *v.* United States	1074
Salerno *v.* Schriro	1056,1069,1082
Salinas *v.* United States	1006
Samet *v.* United States	1046
Sammann *v.* Mayer	1033
Sampson *v.* United States	1035
Samuels *v.* United States	1100
Sanchez *v.* California	1010
Sanchez *v.* United States	1029
Sanchez-Ariza *v.* United States	1043
Sanchez-Arriaga *v.* United States	1089
Sanders; Allison Engine Co. *v.*	662
Sanders *v.* Brown	1031
Sanders *v.* Nunn	1006
Sanders *v.* United States	1013,1072,1103
San Diego County; Tollis, Inc. *v.*	1066
Sang Yoon *v.* Gervin	1008
Sanofi-Aventis; Daniel *v.*	1023
San Pedro *v.* McNeil	1023
Santiago *v.* Pennsylvania	1021
Santos; United States *v.*	507
Saravia-Paguada *v.* Mukasey	1064
Schaub *v.* Ohio	1011
Schils *v.* Washtenaw Community Health Organization	1098
Schlake *v.* United States	1043
Schmidt; Pequeno *v.*	1005
Schneider *v.* Texas	1071
School Bd. of Orange County; Smith *v.*	1066
Schriro; Comier *v.*	1084
Schriro; Hershfeldt *v.*	1071
Schriro; Jones *v.*	1085
Schriro; Salerno *v.*	1056,1069,1082
Schwab *v.* Florida	1059

Page
Science & Technology Corp.; Zhenlu Zhang *v.* 1095
Scott *v.* Kelly 1083
Scott *v.* Quigley 1032
Scott *v.* Texas 1081
Screen Actors Guild, Inc. *v.* Metoyer 1049
Scribner; Drew *v.* 1059
Scribner; Glosson *v.* 1084
Scribner; Lombardelli *v.* 1008
Scribner; Roland *v.* 1071
SDI Industries, Inc.; Smith *v.* 1074
Seckler; Johnson *v.* 1097
Secrest *v.* Ryan 1068
Secretary of Agriculture; Kinder Canal Co. *v.* 1052
Secretary of Army; Munaf *v.* 674
Secretary of Army *v.* Omar 674
Secretary of Homeland Security; Richlin Security Service Co. *v.* 571
Secretary of Labor; Morrison *v.* 1005
Secretary of Transportation; Arizpe *v.* 1019
Secretary of Treasury; Karpova *v.* 1054
Secretary of Treasury; Poll *v.* 1054
Secretary of Veterans Affairs; Bonner *v.* 1005
Secretary of Veterans Affairs; Flores *v.* 1097
Secretary of Veterans Affairs; Milton *v.* 1028
Sedillo-Gutierrez *v.* United States 1087
Segal *v.* United States 1006
Senior Judge, Court of Common Pleas of Pa., Perry Cty.; Scott *v.* 1032
Sesario DePineda, *In re* 1015
Sewell *v.* United States 1066
Shafiq *v.* Mukasey 1033
Shahid *v.* Williams 1056
Shandola *v.* Clarke 1059
Shanklin *v.* Ortiz 1042
Shannon; Colton *v.* 1071
Shannon *v.* Virginia Dept. of Juvenile Justice 1094
Shaw *v.* Texas 1059
Shelborne *v.* Merit Systems Protection Bd. 1041
Shell, *In re* 1031
Shell *v.* DeVries 1036
Shelton *v.* Florida 1083
Shenett *v.* United States 1006
Sherrard *v.* United States 1075
Sherry; Conklin *v.* 1083
Shoaga *v.* Tennessee (Chattanooga Technical Community College) 1011
Shoketsu Kinzoku Kogyo Kabushiki Co.; Festo Corp. *v.* 1093

Page
Showalter *v.* Albuquerque Title Co. 1066
Shurtz *v.* United States 1013
Sibley *v.* Florida Bar 1002,1092
Sibley *v.* Supreme Court of Fla. 1019
Silverleaf Resorts, Inc. *v.* McAteer 1080
Simeone *v.* DiGuglielmo 1036
Simmons, *In re* 1031
Simpson; Foley *v.* 1068
Singer; Bowers *v.* 1020
Sirmans *v.* Quarterman 1070
Sirmons; Van Dusen *v.* 1038
Sisto; Muhammad *v.* 1008
Skains *v.* United States 1088
Skillern *v.* Garrison 1078
Slagter *v.* Stonecraft, LLC 1054
Slater *v.* Connecticut 1085
Sleeper *v.* Spencer 1098
Sleeper Farms *v.* Agway, Inc. 1031
Sloan *v.* Cain 1071
Sloan *v.* Pennsylvania 1024
SMC Corp.; Festo Corp. *v.* 1093
Smith; Abulkhair *v.* 1081
Smith *v.* Barrow 1053
Smith *v.* Brown 1053
Smith *v.* Delaware County Court 1041
Smith *v.* Dinwiddie 1035
Smith *v.* Honolulu Police Dept. 1037
Smith; Jackson *v.* 1037
Smith *v.* Michigan 1081
Smith *v.* Quarterman 1103
Smith *v.* School Bd. of Orange County 1066
Smith *v.* SDI Industries, Inc. 1074
Smith; Thompson *v.* 1038
Smith *v.* United States 1001,1010,1014,1027,1062,1086
Smith *v.* Virginia 1059
Smith *v.* Wilson 1084
Smolka *v.* United States 1045
Snipes *v.* California 1020
Snow; Bautista Rivera *v.* 1054
Solares-Gonzalez *v.* United States 1088
Solomon; Gattis *v.* 1072
Solorzano *v.* United States 1011
Sonora-Chavarin *v.* United States 1046
Soto-Castellanos *v.* United States 1089

Page
Souter; Murray *v.* 1052
South Carolina; Inman *v.* 1094
South Carolina Dept. of Corrections; Freeman *v.* 1081
South Carolina Dept. of Corrections; Wise *v.* 1070
Sowards *v.* Milpitas 1032
Sparks *v.* White 1005
Sparta Township Council; Fernandes *v.* 1066
Spears *v.* Johnson 1049
Speight *v.* United States 1046
Spellicy *v.* United States 1013
Spells *v.* New York City 1025
Spencer; Sleeper *v.* 1098
Splittorff *v.* Aigner 1065
Spratt *v.* United States 1025
Spry *v.* United States 1086
Spuck *v.* Lynch 1062
Spuck *v.* Stowitzky 1062
Stacks; Ramirez *v.* 1070
Staffney, *In re* 1027,1092
Stafford *v.* United States 1045
Stambaugh *v.* California 1096
Stamper *v.* United States 1042
Stansberry; Ramsey *v.* 1099
State. See also name of State.
State Attorney, Sumter County; Johnson *v.* 1040
State Bank Comm'r; Lehman Brothers Bank, FSB *v.* 1018
State Bar of Cal.; Allegrino *v.* 1018
State Bar of Cal.; Konig *v.* 1079
Staves *v.* United States 1010
Stayton *v.* Nevada 1021
Steele *v.* McNeil 1030
Steele; Sterling *v.* 1022
Steiger *v.* United States 1047
Stein *v.* United States 1074
Stephen *v.* Internal Revenue Service 1029
Stephens *v.* Alabama 1035
Stephens *v.* Indiana 1039
Steppe *v.* Virginia 1068
Sterling *v.* Steele 1022
Sterngass *v.* Woodbury 1033
Stevens *v.* Buss 1034
Stevens; Buss *v.* 1048
Stevens; Celley *v.* 1037
Stewart *v.* Bond 1095

Page
Stewart; Dropalski *v.* 1020
Stillwater; Kilbourne *v.* 1039
Stoller, *In re* 1031
Stoller *v.* Attorney Registration and Disciplinary Comm'n 1063
Stone *v.* United States 1025
Stonecraft, LLC; Slagter *v.* 1054
Stonier, *In re* 1017
Stovall; Fuller *v.* 1082
Stowitzky; Spuck *v.* 1062
Street *v.* Verizon South, Inc. 1057
Strickland; Biros *v.* 1006
Strickland; Cooey *v.* 1014,1103
Strickland *v.* Georgia 1062
Stringer *v.* American Bankers Ins. Co. of Fla. 1052
Stroman Realty, Inc. *v.* Martinez 1065
Struck *v.* Cook County Public Guardian 1023
Struck *v.* Harris 1038
Stuckey *v.* West Virginia 1095
Sturgell; Taylor *v.* 880
Sueing *v.* Michigan 1027
Suggs *v.* United States 1073
Suncoast Construction Group; Jenkins *v.* 1009
Sung Yuen Wong *v.* Superior Court of Cal., Los Angeles County 1066
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., Los Angeles County; Sung Yuen Wong *v.* 1066
Supreme Court of Cal.; Drum *v.* 1079
Supreme Court of Fla.; Sibley *v.* 1019
Supreme Court of Kan.; Johnson *v.* 1009
Supreme Court of La.; Riley *v.* 1022
Suter; Evans *v.* 1062
Swain *v.* California 1081
Syngenta Seeds, Inc.; Monsanto Co. *v.* 1077
Taek Sang Yoon *v.* Gervin 1008
Tae Kyong Kim *v.* Mukasey 1031
Taka *v.* E. I. du Pont de Nemours & Co. 1004
Talison *v.* White 1068
Talon *v.* National Transportation Safety Bd. 1015
Tampa Greyhound Track; Dar Dar *v.* 1033
Taniguchi *v.* United States 1075
Tarango-Nieto *v.* United States 1087
Tarkington *v.* California 1038
Tarvin *v.* Mississippi 1035
Tavarez *v.* Marshall 1098

Page
Tax Comm'r of Ohio; Lovell *v.* 1033
Tax Equalization and Review Comm'n; Widtfeldt *v.* 1062
Taylor *v.* Crawford 1004
Taylor *v.* Quarterman 1008,1077
Taylor *v.* Sturgell 880
Taylor *v.* Texas 1068
Taylor *v.* United States 1002,1044,1073,1101
Teitgen *v.* California 1021
Tellier *v.* United States 1062
Tennessee; Bryan *v.* 1071
Tennessee; Finley *v.* 1057
Tennessee; Mann *v.* 1057
Tennessee; Threat *v.* 1008
Tennessee (Chattanooga Technical Community College); Shoaga *v.* 1011
Terrell; Moore *v.* 1055
Terrell *v.* Texas 1034
Territory. See name of Territory.
Terry *v.* Georgia 1027
Terry *v.* United States 1101
Tesley *v.* Michigan 1036
Tetreault *v.* Houghton 1104
Tetreault *v.* Washington Dept. of Social and Health Services 1104
Tewolde *v.* California 1021
Texas; Benavides *v.* 1037
Texas; Chamberlain *v.* 1104
Texas; Cheatham *v.* 1071
Texas; Crawford *v.* 1063
Texas; Dillon *v.* 1041
Texas; Gallo *v.* 1080
Texas; Goodley *v.* 1071
Texas; Hernandez *v.* 1036,1083
Texas; Hunter *v.* 1068
Texas; Ibarra *v.* 1055
Texas; Johnson *v.* 1085
Texas; Lawrence *v.* 1007
Texas; Moore *v.* 1070
Texas; Prather *v.* 1049
Texas; Reeves *v.* 1009
Texas; Rhodes *v.* 1009
Texas; Schneider *v.* 1071
Texas; Scott *v.* 1081
Texas; Shaw *v.* 1059
Texas; Taylor *v.* 1068
Texas; Terrell *v.* 1034

Page
Texas; Turner *v.* 1007
Texas; Utomi *v.* 1008
Thacker *v.* Federal Communications Comm'n 1004
Thacker *v.* United States 1089
Thanh Tran *v.* Mississippi 1054
That Hin Liong *v.* Mukasey 1058
Theer *v.* North Carolina 1055
Thinkstream, Inc. *v.* Adams 1050
Thomas *v.* Johnson 1010
Thomas *v.* Michigan 1039
Thomas *v.* Monroe 1020
Thomas *v.* Quarterman 1037
Thomas *v.* Trico Products Corp. 1079
Thomas *v.* United States 1001,1061
Thomas *v.* U. S. District Court 1044
Thompson *v.* Davis 1052
Thompson *v.* North Dakota 1036
Thompson *v.* Smith 1038
Thompson *v.* United States 1087,1090
Thompson *v.* Virgin Records America, Inc. 1019
Thorpe *v.* Erwin 1015
Thrasher *v.* United States 1007
Threat *v.* Tennessee 1008
Ticas *v.* California 1058
Tiger *v.* United States 1001
Tillman *v.* Warren 1007
Tinkham *v.* Kelly 1103
Tinsley *v.* Jones 1036
T-Mobile USA, Inc. *v.* Ford 1065
T-Mobile USA, Inc. *v.* Gatton 1064
T-Mobile USA, Inc. *v.* Laster 1064
Toehupe *v.* United States 1022
Tollis, Inc. *v.* San Diego County 1066
Torres-Maldonado *v.* United States 1102
Torres-Quiroz *v.* United States 1088
Tovar; Reyes *v.* 1103
Tovar *v.* United States 1042
Town. See name of town.
Townsend *v.* United States 1050
Toyota Motor Corp. *v.* Paice LLC 1032
Tran *v.* Mississippi 1054
Tranquil Prospects, Ltd. *v.* Howmedica Osteonics Corp. 1094
Transportation Agreement of Consol. School Dist. 47; Nowak *v.* 1054
Trappers Lake Lodge and Resort *v.* U. S. Forest Service 1054

Page
Travis *v.* Bell 1097
Trevino; Campbell *v.* 1091
Trico Products Corp.; Thomas *v.* 1079
Trujillo *v.* Quarterman 1079
Trujillo-Loya *v.* United States 1075
Truly *v.* Jones 1099
TSA Stores *v.* Florida Dept. of Agriculture and Consumer Servs. 1033
Turner *v.* Kemna 1085
Turner *v.* Texas 1007
Tyler *v.* Dann 1055
Tyler *v.* McCann 1050
Tyson Foods, Inc. *v.* de Asencio 1093
Underwood *v.* Hogsten 1012,1044
United States. See name of other party.
U. S. Attorney; Morrow *v.* 1019
U. S. Court of Appeals; Bishop *v.* 1048
U. S. District Court; Green *v.* 1036
U. S. District Court; Mathis *v.* 1103
U. S. District Court; Raynor *v.* 1065
U. S. District Court; Thomas *v.* 1044
U. S. District Court; Wise *v.* 1070
U. S. District Court; Young *v.* 1012
U. S. District Judge; Chisum *v.* 1041
U. S. Forest Service; R. M. Investment Co. *v.* 1054
U. S. Forest Service; Trappers Lake Lodge and Resort *v.* 1054
U. S. Parole Comm'n; Fazzini *v.* 1050
University of Cal.; Zochlinski *v.* 1103
University of Rochester; Mudholkar *v.* 1080
Urlacher *v.* Washington 1038
US Airways, Inc.; Frazier *v.* 1080
USEC Inc. *v.* Eurodif S. A. 1004
Utah; Barzee *v.* 1056
Utomi *v.* Texas 1008
Uttecht; Levy *v.* 1024
Valdespino *v.* United States 1088
Valentine *v.* Nettles 1039
Valmer *v.* United States 1044
Vandivere *v.* United States 1015
Van Dusen *v.* Sirmons 1038
Van Tassel *v.* Rozum 1085
Vargas *v.* United States 1086
Vargas-Galicia *v.* United States 1013
Vargas-Garcia *v.* United States 1102
Vargas-Vasquez *v.* United States 1075

Page
Vaughn *v.* United States 1047
Vega *v.* Wiley 1012
Velasquez *v.* Ohio 1011
Velazquez *v.* Arizona 1014
Verizon South, Inc.; Street *v.* 1057
Vicol *v.* United States 1075
Vieux *v.* Williamson 1012
Villafuerte *v.* United States 1075
Villafuerte-Rodriguez *v.* United States 1075
Village. See name of village.
Villanueva-Rivera *v.* United States 1019
Villegas *v.* United States 1102
Viray *v.* California 1077
Viray *v.* Mora 1002,1078
Virgin Enterprises Ltd.; Rosenruist-Gestao E Servicos LDA *v.* 1065
Virginia; Anderson *v.* 1054
Virginia; Ellis *v.* 1009
Virginia; Gordon *v.* 1083
Virginia; Lewis *v.* 1056
Virginia *v.* Moore 164
Virginia; Olsen *v.* 1038
Virginia; Smith *v.* 1059
Virginia; Steppe *v.* 1068
Virginia Dept. of Juvenile Justice; Shannon *v.* 1094
Virginia Electric & Power Co.; Marro *v.* 1066
Virgin Records America, Inc.; Thompson *v.* 1019
Virruela Lopez *v.* Brigano 1007
Visa International Service Assn.; Perfect 10, Inc. *v.* 1079
Volkova *v.* Mukasey 1080
Voorhies; Gilcreast *v.* 1058
Vose *v.* Kliment 1064
Voters Ed. Committee *v.* Washington Public Disclosure Comm'n 1079
Vyta Corp. *v.* Depository Trust & Clearing Corp. 1031
Waddington; Goodwin *v.* 1023
Wade *v.* Maryland 1040
Waldron; Barrett *v.* 1080
Walker *v.* Georgia 1015
Walker *v.* United States 1002,1048,1061
Wall; Anderson *v.* 1072
Wallace *v.* Folino 1034
Walsh; Funches *v.* 1022
Walsh *v.* Woods 1035
Walters *v.* McNeil 1040
Walters *v.* United States 1042

	Page
Wanxia Liao *v.* Quidachay	1070
Ward; Lipscomb *v.*	1084
Ward *v.* Michigan Dept. of Corrections	1006
Warden. See name of warden.	
Ware *v.* Bank One	1056
Ware *v.* Michigan Dept. of Labor	1070
Warlick *v.* Florida	1041
Warner *v.* United States	1064
Warren *v.* Quarterman	1039
Warren; Tillman *v.*	1007
Warren *v.* United States	1027
Warren Area School Dist.; Oz Gas, Ltd. *v.*	1065
Washington; Benn *v.*	1080
Washington *v.* Hastings	1086
Washington *v.* Jackson State Univ.	1024
Washington; Mason *v.*	1035
Washington *v.* Quarterman	1057
Washington *v.* United States	1061
Washington; Urlacher *v.*	1038
Washington Dept. of Social and Health Services; Tetreault *v.*	1104
Washington Mut. Bank; Barnes *v.*	1057
Washington Public Disclosure Comm'n; Voters Ed. Committee *v.*	1079
Washtenaw Community Health Organization; Schils *v.*	1098
Watkins *v.* Driver	1073
Watkins; Mitchell *v.*	1098
Watkins *v.* United States	1026
Watson; Pelletier *v.*	1098
Watson *v.* United States	1044,1066
Watts *v.* United States	1042
Waukegan; Richards *v.*	1070
Waxman, *In re*	1030
Weaver *v.* McNeil	1096
Webb *v.* United States	1027,1066
Weisenfreund; Figueroa *v.*	1062
Wells *v.* United States	1013
Wesley; Law *v.*	1041
West; AK Steel Corp. Retirement Accumulation Pension Plan *v.*	1092
West *v.* Bell	1008
Westerfield *v.* Penner	1021
West Virginia; Newsome *v.*	1098
West Virginia; Stuckey *v.*	1095
West Virginia State Tax Comm'r; McLear *v.*	1054
Wheeler *v.* Lawler	1049
Wheeler *v.* United States	1012

	Page
Whitcombe *v.* Henak	1015
White *v.* Curry	1084
White *v.* Oklahoma	1083
White; Sparks *v.*	1005
White; Talison *v.*	1068
White *v.* United States	1073
Whitehead *v.* United States	1046
Whiteside *v.* Carr, Hunt & Joy, LLP	1048
Whitfield; Radian Guaranty, Inc. *v.*	1091
Widtfeldt *v.* Council for Discipline of Neb. Supreme Court	1018
Widtfeldt *v.* Tax Equalization and Review Comm'n	1062
Wiederhold *v.* Fox	1042
Wiley; Vega *v.*	1012
Wilkerson; Guinn *v.*	1022
Willems *v.* California	1082
Williams, *In re*	1031
Williams *v.* Almager	1097
Williams *v.* Arkansas	1096
Williams; Brown *v.*	1101
Williams *v.* Delaware	1097
Williams *v.* Departmental Discip. Comm. for First Jud. Dept.	1002,1018
Williams *v.* Georgia	1004
Williams *v.* Haws	1056
Williams *v.* McKee	1096
Williams; Philip Morris USA Inc. *v.*	1093
Williams; Shahid *v.*	1056
Williams *v.* United States	1002, 1013,1024,1026,1045,1047,1061,1067,1099,1100
Williams; United States *v.*	285
Williamson; Vieux *v.*	1012
Williams & Sons Plumbing & Heating Inc.; Woods *v.*	1059
Wilms *v.* Finnan	1068
Wilson, *In re*	1078
Wilson; Calligan *v.*	1095
Wilson; Carrion *v.*	1097
Wilson; Smith *v.*	1084
Wilson *v.* United States	1090
Wiltz *v.* Middlesex County Office of Prosecutor	1062
Winders *v.* California	1083
Winding *v.* King	1041
Windley *v.* New York	1024
Wingfield *v.* Patton	1025
Winn *v.* Delaware	1085
Winston *v.* United States	1101

Page
Wint *v.* United States 1086
Wisconsin; Bembenek *v.* 1080
Wisconsin; Quarzenski *v.* 1019
Wise *v.* South Carolina Dept. of Corrections 1070
Wise *v.* U. S. District Court 1070
Wolfenbarger; Bigby *v.* 1071
Wolfenbarger; Giles *v.* 1039
Wolfenbarger; Little *v.* 1039
Wong *v.* Superior Court of Cal., Los Angeles County 1066
Woodall *v.* California 1095
Woodbury; Sterngass *v.* 1033
Woods; Walsh *v.* 1035
Woods *v.* Williams & Sons Plumbing & Heating Inc. 1059
Wooten *v.* United States 1086
Worthington; McGowan *v.* 1025
Wright *v.* Astrue 1092
Wright; Bright *v.* 1083
Wright *v.* Daley 1049
Wright *v.* Lafler 1069
Wyatt *v.* Zuckerman 1048
Wynder; Cherry *v.* 1021
Wynder; Mathis *v.* 1037
Wynder; Morales *v.* 1096
Xiangyuan Zhu, *In re* 1017
Xiangyuan Zhu *v.* Federal Housing Finance Bd. 1078
Yang *v.* Mukasey 1031
Yates; Foster *v.* 1036
Yates *v.* United States 1047
Yeingst; Maldonado *v.* 1066
Yell *v.* Kentucky 1011
Yi Qiang Yang *v.* Mukasey 1031
Yoon *v.* Gervin 1008
Young, *In re* 1003
Young *v.* Bank One, N. A. 1094
Young *v.* United States 1075
Young *v.* U. S. District Court 1012
Yuen Wong *v.* Superior Court of Cal., Los Angeles County 1066
Zaidi *v.* Roswell 1095
Zamora *v.* Mukasey 1004
Zamora-Magdaleno *v.* United States 1089
Zatisaval *v.* United States 1045
Zavala *v.* United States 1061
Zavala-Jacobo *v.* United States 1012
z4 Technologies, Inc.; Microsoft Corp. *v.* 1028

Page
Zhang *v.* Science & Technology Corp. 1095
Zhen Hua Dong *v.* Department of Justice 1053
Zhenlu Zhang *v.* Science & Technology Corp. 1095
Zhu, *In re* 1017
Zhu *v.* Federal Housing Finance Bd. 1078
Zochlinski *v.* University of Cal. 1103
Zomba Enterprises, Inc.; Panorama Records, Inc. *v.* 1032
Zucker *v.* California 1039
Zuckerman; Wyatt *v.* 1048
Zuppo *v.* Carroll 1023

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2007

UNITED STATES *v.* CLINTWOOD ELKHORN MINING CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 07–308. Argued March 24, 2008—Decided April 15, 2008

The Internal Revenue Code requires a taxpayer seeking a refund of taxes unlawfully assessed to file an administrative claim with the Internal Revenue Service (IRS) before filing suit against the Government, see 26 U. S. C. §7422(a). Such claim must be filed within three years of the filing of a tax return or two years of the tax's payment, whichever is later, see §6511(a). In contrast, the Tucker Act allows claims to be brought against the Government within six years of the challenged conduct. Respondent coal companies paid taxes on coal exports under a portion of the Code later invalidated under the Export Clause of the Constitution. They filed timely administrative claims and recovered refunds of their 1997–1999 taxes, but sought a refund of their 1994–1996 taxes in the Court of Federal Claims without complying with the Code's refund procedures. Nevertheless, the court allowed them to proceed directly under the Export Clause and the Tucker Act. Affirming in relevant part, the Federal Circuit ruled that the companies could pursue their Export Clause claim despite their failure to file timely administrative refund claims.

Held: The plain language of 26 U. S. C. §§7422(a) and 6511 requires a taxpayer seeking a refund for a tax assessed in violation of the Export Clause, just as for any other unlawfully assessed tax, to file a timely

Syllabus

administrative refund claim before bringing suit against the Government. Pp. 7–15.

(a) Because the companies did not file a refund claim with the IRS for the 1994–1996 taxes, they may, under § 7422(a), bring "[n]o suit" in "any court" to recover "any internal revenue tax" or "any sum" alleged to have been wrongfully collected "in any manner." Moreover, § 6511's time limits for filing administrative refund claims—set forth in an "unusually emphatic form," *United States* v. *Brockamp*, 519 U. S. 347, 350—apply to "*any* tax imposed by [Title 26]," § 6511(a) (emphasis added). Contrary to the companies' claim that these statutes are ambiguous, the provisions clearly state that taxpayers must comply with the Code's refund scheme before bringing suit, including the filing of a timely administrative claim. Indeed, this question was all but decided in *United States* v. *A. S. Kreider Co.*, 313 U. S. 443, where the Court held that the limitations period in the Revenue Act then in effect, not the Tucker Act's longer period, applied to tax refund actions. As was the case there, the current Code's refund scheme would have "no meaning whatever," *id.*, at 448, if taxpayers failing to comply with it were nonetheless allowed to bring suit subject only to the Tucker Act's longer time bar. Pp. 7–9.

(b) The companies nonetheless assert that their claims are exempt from the Code provisions' broad sweep because the claims derive from the Export Clause. The principles that a "constitutional claim can become time-barred just as any other claim can," *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 292, and that Congress has the authority to require administrative exhaustion before allowing a suit against the Government, even for a constitutional violation, see, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1018, are fully applicable to unconstitutional taxation claims. The companies' attempt to distinguish Export Clause claims on the ground that the Clause is not simply a limitation on taxing authority but a prohibition carving particular economic activity out of Congress's power is without substance and totally manipulable. There is no basis for treating taxes collected in violation of that Clause differently from taxes challenged on other grounds. Because the companies acknowledge that their claims are subject to the Tucker Act's time bar, the question is not whether their refund claim can be limited, but rather which limitation applies. Their argument that, despite explicit and expansive statutory language, the Code's refund scheme does not apply to their case as a matter of statutory interpretation is unavailing. They claim that Congress could not have intended it to apply a "constitutionally dubious" refund scheme

Syllabus

to taxes assessed in violation of the Export Clause, but the statutory language emphatically covers the facts of this case. In any event, there is no constitutional problem. Congress's detailed scheme is designed "to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue," *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, 272, to provide that refund claims are made promptly, and to allow the IRS to avoid unnecessary litigation by correcting conceded errors. Even when a tax's constitutionality is challenged, taxing authorities have an "exceedingly strong interest in financial stability," *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 37, that they may pursue through provisions of the sort at issue. There is no reason why invoking the Export Clause would deprive Congress of the power to protect this interest. The companies' claim that the Code procedures are excessively burdensome is belied by their own invocation of those procedures for taxes paid within the Code's limitations period, which resulted in full refunds with interest. Pp. 9–12.

(c) The companies' fallback argument—that even if the refund scheme applies to Export Clause cases generally, it does not apply when taxes are unconstitutional on their face—is rejected. *Enochs* v. *Williams Packing & Nav. Co.*, 370 U. S. 1, distinguished. Pp. 12–14.

473 F. 3d 1373, reversed.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

William M. Jay argued the cause for the United States. With him on the briefs were *Solicitor General Clement*, *Acting Assistant Attorney General Morrison*, *Deputy Solicitor General Hungar*, *Acting Deputy Assistant Attorney General Rothenberg*, *Kenneth L. Greene*, and *Steven W. Parks*.

Patricia A. Millett argued the cause for respondents. With her on the brief were *Thomas C. Goldstein*, *Steven H. Becker*, *Paul A. Horowitz*, and *Suzanne I. Offerman*.*

**Anthony T. Caso*, *Karen R. Harned*, and *Elizabeth Milito* filed a brief for the National Federation of Independent Business Legal Foundation as *amicus curiae* urging affirmance.

Clifton S. Elgarten filed a brief for Alliance Coal, LLC, as *amicus curiae*.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Internal Revenue Code provides that taxpayers seeking a refund of taxes unlawfully assessed must comply with tax refund procedures set forth in the Code. Under those procedures, a taxpayer must file an administrative claim with the Internal Revenue Service before filing suit against the Government. Such a claim must be filed within three years of the filing of a return or two years of payment of the tax, whichever is later. The Tucker Act, in contrast, is more forgiving, allowing claims to be brought against the United States within six years of the challenged conduct. The question in this case is whether a taxpayer suing for a refund of taxes collected in violation of the Export Clause of the Constitution may proceed under the Tucker Act, when his suit does not meet the time limits for refund actions in the Internal Revenue Code. The answer is no.

I

A taxpayer seeking a refund of taxes erroneously or unlawfully assessed or collected may bring an action against the Government either in United States district court or in the United States Court of Federal Claims. 28 U. S. C. § 1346(a)(1); *EC Term of Years Trust* v. *United States*, 550 U. S. 429, 431, and n. 2 (2007). The Internal Revenue Code specifies that before doing so, the taxpayer must comply with the tax refund scheme established in the Code. *United States* v. *Dalm*, 494 U. S. 596, 609–610 (1990). That scheme provides that a claim for a refund must be filed with the Internal Revenue Service (IRS) before suit can be brought, and establishes strict timeframes for filing such a claim.

In particular, 26 U. S. C. § 7422(a) specifies:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been col-

> lected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the [IRS]."

The Code further establishes a time limit for filing such a refund claim with the IRS: To receive a "refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return," a refund claim must be filed no later than "3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later." §6511(a). And §6511(b)(1) mandates that "[n]o credit or refund shall be allowed or made" if a claim is not filed within the time limits set forth in §6511(a). "Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by §6511(a), a suit for refund . . . may not be maintained in any court." *Dalm*, *supra*, at 602.

In 1978, Congress levied a tax "on coal from mines located in the United States sold by the producer," 26 U. S. C. §4121(a)(1), and specifically applied this tax to coal exports, see §4221(a) (1994 ed.) (excepting from the general ban on taxing exports those taxes imposed under, *inter alia*, §4121). In 1998, a group of companies challenged the tax in the District Court for the Eastern District of Virginia, contending that it violated the Export Clause of the Constitution. That Clause provides that "No Tax or Duty shall be laid on Articles exported from any State." Art. I, §9, cl. 5. The District Court agreed and held the tax unconstitutional. *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466, 469 (1998). The Government did not appeal, and the IRS acquiesced in the District Court's holding. See IRS Notice 2000–28, 2000–1 Cum. Bull. 1116, 1116–1117 (IRS Notice).

The respondents here, three coal companies, had all paid taxes on coal exports under §4121(a) "[s]ince as early as 1978." App. to Pet. for Cert. 36a. After §4121(a) was held

unconstitutional as applied to coal exports, the companies filed timely administrative claims in accordance with the refund scheme outlined above, seeking a refund of coal taxes they had paid in 1997, 1998, and 1999. The IRS refunded those taxes, with interest.

The companies also filed suit in the Court of Federal Claims seeking a refund of $1,065,936 in taxes paid between 1994 and 1996. They did not file any claim for those taxes with the IRS; any such claim would of course have been denied, given the limits set forth in §6511. See IRS Notice, at 1117 ("Claims [for a refund of taxes paid under §4121] must be filed within the period prescribed by §6511"). Notwithstanding the failure of the companies to file timely administrative refund claims, the Court of Federal Claims allowed the companies to pursue their suit directly under the Export Clause. Jurisdiction rested on the Tucker Act, 28 U. S. C. §1491(a)(1), and the companies limited their claim to taxes paid within that statute's 6-year limitations period, §2501 (2000 ed. and Supp. V).

In allowing the companies to proceed outside the confines of the Internal Revenue Code refund procedures, the court relied on the decision of the Court of Appeals for the Federal Circuit in *Cyprus Amax Coal Co.* v. *United States*, 205 F. 3d 1369 (2000). *Andalex Resources, Inc.* v. *United States*, 54 Fed. Cl. 563, 564 (2002). The Court of Federal Claims did not, however, allow the companies to recover interest on the taxes paid under 28 U. S. C. §2411. That provision requires the Government to pay interest "for any overpayment in respect of any internal-revenue tax," but the court held that the statute applied only to refund claims brought under the Code, not to claims brought directly under the Export Clause. 54 Fed. Cl., at 566.

The Court of Appeals affirmed in part and reversed in part. It first refused to revisit its holding in *Cyprus Amax*, and therefore upheld the ruling that the companies could pursue their claim under the Export Clause, despite having

failed to file timely administrative refund claims. 473 F. 3d 1373, 1374–1375 (CA Fed. 2007). The Court of Appeals reversed the Court of Federal Claims interest holding, however, finding that the Government was required to pay the companies interest on the 1994–1996 amounts under §2411. *Id.*, at 1376.

We granted certiorari, 552 U. S. 1061 (2007), and now reverse.

II

A

The outcome here is clear given the language of the pertinent statutory provisions. Title 26 U. S. C. §7422(a) states that "*[n]o suit* . . . shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed or collected, or of *any penalty* claimed to have been collected without authority, or of *any sum* alleged to have been excessive or *in any manner* wrongfully collected, until a claim for refund . . . has been duly filed with" the IRS. (Emphasis added.) Here the companies did not file a refund claim with the IRS for the 1994–1996 taxes, and therefore may bring "[n]o suit" in "any court" to recover "any internal revenue tax" or "any sum" alleged to have been wrongfully collected "in any manner." Five "any's" in one sentence and it begins to seem that Congress meant the statute to have expansive reach.

Moreover, the time limits for filing administrative refund claims in §6511—set forth in an "unusually emphatic form," *United States* v. *Brockamp*, 519 U. S. 347, 350 (1997)—apply to "*any* tax imposed by this title," 26 U. S. C. §6511(a) (emphasis added). The statute further provides that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) . . . unless a claim for credit or refund is filed by the taxpayer within such period." §6511(b)(1). Again, this language on its face plainly covers the companies' claim for a "refund" of

"tax[es] imposed by" Title 26, specifically 26 U. S. C. § 4121. The companies argue that these statutory provisions are ambiguous, Brief for Respondents 43–45, but we cannot imagine what language could more clearly state that taxpayers seeking refunds of unlawfully assessed taxes must comply with the Code's refund scheme before bringing suit, including the requirement to file a timely administrative claim.

Indeed, we all but decided the question presented over six decades ago in *United States* v. *A. S. Kreider Co.*, 313 U. S. 443 (1941). Section 1113(a) of the Revenue Act of 1926, like the refund claim provision in § 7422(a) of the current Code, prescribed that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue," and established a time limit for bringing suit once the claim-filing requirement had been met. 44 Stat. 116. Like the companies here, A. S. Kreider had failed to file a tax refund action within that limitations period. See 313 U. S., at 446. And, like the companies here, A. S. Kreider argued that it was instead subject only to the longer 6-year statute of limitations under the Tucker Act. *Id.*, at 447.

We rejected the claim, holding that the Tucker Act limitations period "was intended merely to place an outside limit on the period within which all suits might be initiated" under that Act, and that "Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment." *Ibid.* We held that the limitations period in § 1113(a) was "precisely that type of provision," finding that Congress created a shorter statute of limitations for tax claims because "suits against the United States for the recovery of taxes impeded effective

administration of the revenue laws." *Ibid.* If such suits were allowed to be brought subject only to the 6-year limitations period in the Tucker Act, we explained, § 1113(a) would have "no meaning whatever." *Id.*, at 448. So too here. The refund scheme in the current Code would have "no meaning whatever" if taxpayers failing to comply with it were nonetheless allowed to bring suit subject only to the Tucker Act's longer time bar.

B

The companies gamely argue for a different result here because the coal tax at issue was assessed in violation of the Export Clause of the Constitution. They spend much of their brief arguing that the Export Clause itself creates a cause of action against the Government, which can be brought directly under the Tucker Act. See Brief for Respondents 8–25. We need not decide this question here, because it does not matter. If the companies' claims are subject to the Code provisions, those claims are barred whatever the source of the cause of action. We therefore turn to the companies' assertion that their claims are somehow exempt from the broad sweep of the Code provisions.

The companies do not argue for such an exemption simply because their claims are based on a constitutional violation. As they acknowledge, *id.*, at 34, a "constitutional claim can become time-barred just as any other claim can," *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 292 (1983). Further, Congress has the authority to require administrative exhaustion before allowing a suit against the Government, even for a constitutional violation. See, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1018 (1984); *Christian* v. *New York State Dept. of Labor*, 414 U. S. 614, 622 (1974); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 766–767 (1947).

These principles are fully applicable to claims of unconstitutional taxation, a point highlighted by what we have said

in other cases about the Anti-Injunction Act. That statute commands that (absent certain exceptions) "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U. S. C. § 7421(a). The "decisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim . . . is of no consequence" to whether the prohibition against tax injunctions applies. *Alexander* v. *"Americans United" Inc.*, 416 U. S. 752, 759 (1974). This is so even though the Anti-Injunction Act's prohibitions impose upon the wronged taxpayer requirements at least as onerous as those mandated by the refund scheme—the taxpayer must succumb to an unconstitutional tax, and seek recourse only after it has been unlawfully exacted. We see no reason why compliance with straightforward administrative requirements and reasonable time limits to seek a refund once a tax has been paid should lead to a different result.

The companies assert that Export Clause claims in particular must be treated differently from constitutional claims in general. This is so, they argue, because the Clause is not simply a limitation on the taxing authority but a prohibition that "carves one particular economic activity completely out of Congress's power." Brief for Respondents 11. That distinction is without substance and totally manipulable: If the pertinent authority is regarded as the power to tax exports, the Clause is indeed a complete prohibition on congressional power. But if the pertinent authority is instead viewed as the "Power To lay and collect Taxes," U. S. Const., Art. I, § 8, cl. 1, then the Clause is properly regarded as a limitation on that power. We do not question the importance of the Export Clause to the success of the enterprise in Philadelphia in 1787, see Brief for Respondents 11–13, but we see no basis for treating taxes collected in violation of its terms differently from taxes challenged on other grounds.

Indeed, the companies more or less give up the game when they acknowledge that their claims are subject to the Tucker

Act's statute of limitations. See *id.*, at 34. The question is thus not whether the companies' refund claim under the Export Clause can be limited, but rather which limitation applies. The companies are therefore left to argue that, despite the explicit and expansive statutory language described above, the refund scheme in Title 26 does not apply to their case as a matter of statutory interpretation. We find this ambitious argument unavailing.

The companies seek to support it by characterizing the refund scheme set out in the Code as "pro-government and revenue-protective," and therefore "constitutionally dubious" as applied to Export Clause cases. *Id.*, at 28–29. Given this potential constitutional infirmity, the companies argue, Congress could not have intended the refund scheme to apply to taxes assessed in violation of the Export Clause. See *Ashwander* v. *TVA*, 297 U. S. 288, 341 (1936) (Brandeis, J., concurring). We disagree. To begin with, any argument that Congress did not mean to require those in the companies' position to comply with the tax refund scheme runs into a powerful impediment, for "[t]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances.'" *Ardestani* v. *INS*, 502 U. S. 129, 135 (1991) (quoting *Rubin* v. *United States*, 449 U. S. 424, 430 (1981)). As we have already explained, the language of the relevant statutes emphatically covers the facts of this case.

In any event, we see no constitutional problem at all. Congress has indeed established a detailed refund scheme that subjects complaining taxpayers to various requirements before they can bring suit. This scheme is designed "to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue," *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, 272 (1931), to provide that refund claims are made promptly, and to allow the IRS to avoid unnecessary litigation by correcting conceded errors. Even when

the constitutionality of a tax is challenged, taxing authorities do in fact have an "exceedingly strong interest in financial stability," *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 37 (1990), an interest they may pursue through provisions of the sort at issue here.

We do not see why invocation of the Export Clause would deprive Congress of the power to protect this "exceedingly strong interest." Congress may not impose a tax in violation of the Export Clause (or any other constitutional provision, for that matter). But it is certainly within Congress's authority to ensure that allegations of taxes unlawfully assessed—whether the asserted illegality is based upon the Export Clause or any other provision of law—are processed in an orderly and timely manner, and that costly litigation is avoided when possible. The companies' claim that the Code procedures are themselves excessively burdensome is belied by the companies' own invocation of those procedures for taxes paid within the Code's limitations period, which resulted in full refunds with interest.

C

As a fallback argument, the companies maintain that even if the refund scheme applies to Export Clause cases generally, it does not "apply to taxes that are, on their face, unconstitutional." Brief for Respondents 39. They rely for this proposition on *Enochs* v. *Williams Packing & Nav. Co.*, 370 U. S. 1 (1962), a case dealing with the Anti-Injunction Act, 26 U. S. C. § 7421(a). Despite that Act's broad and mandatory language, we explained that "if it is clear that under no circumstances could the Government ultimately prevail, . . . the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in 'the guise of a tax.'" 370 U. S., at 7 (quoting *Miller* v. *Standard Nut Margarine Co. of Fla.*, 284 U. S. 498, 509

(1932)). See also *Bob Jones Univ.* v. *Simon*, 416 U. S. 725, 745–746 (1974) (reaffirming the "under no circumstances" rule of *Williams Packing*).

On the force of *Williams Packing*, the companies argue that the refund scheme should similarly be read as inapplicable to situations in which there are "no circumstances" under which the tax imposed could be held valid under the Export Clause. The trouble with this is that § 7422, the primary statute governing the refund process, is written much more broadly than § 7421(a), the statute at issue in *Williams Packing*. Section 7422(a) states that "[n]o suit . . . shall be maintained in any court for the recovery of any *internal revenue tax* alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the" IRS. (Emphasis added.) This language generally tracks that of the Anti-Injunction Act, which also applies to suits "restraining the assessment or collection of any *tax*." § 7421(a) (emphasis added). But § 7422(a) goes on to apply its prohibition against suit absent a proper refund claim to "*any sum* alleged to have been excessive or in any manner wrongfully collected." (Emphasis added.) Even if we agreed that a facially unconstitutional tax for purposes of the tax refund scheme is "merely in 'the guise of a tax,'" *Williams Packing*, *supra*, at 7 (quoting *Standard Nut Margarine*, *supra*, at 509), and therefore not a "tax alleged to have been erroneously or illegally assessed or collected," § 7422(a), it would nevertheless clearly fall into the broader category of "any sum . . . in any manner wrongfully collected," *ibid.*

Moreover, even if we were to accept the companies' argument that the "under no circumstances" limitation on the Anti-Injunction Act applies to the refund scheme, they still would not prevail. We made clear in *Williams Packing* that "the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the

information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." 370 U. S., at 7. A tax injunction suit, of course, is brought at the time the Government attempts to assess a tax on the taxpayer. Thus, if we applied the *Williams Packing* "under no circumstances" rule to the refund scheme, we would judge the Government's chances of success as of the time the tax was assessed.

In this case, the companies seek refunds for taxes paid between 1994 and 1996. At that time, the scope of the Export Clause was sufficiently debatable that we granted certiorari in 1995, see *United States* v. *International Business Machines Corp.*, 516 U. S. 1021, and again in 1997, see *United States* v. *United States Shoe Corp.*, 522 U. S. 944, to clear it up. What is more, the District Court that struck down the application of §4121(a) to coal exports partially relied on these cases in arriving at its decision, *Ranger Fuel Corp.*, 33 F. Supp. 2d, at 469, and the IRS cited, *inter alia*, *International Business Machines*, *supra*, in its acquiescence notice, see IRS Notice, at 1116. Indeed, we would think that if the unconstitutionality of the coal export tax were so obvious that the Government had no chance of prevailing, someone paying the tax—such as these companies—would have successfully challenged it earlier than 20 years after its enactment.

We therefore hold that the plain language of 26 U. S. C. §§7422(a) and 6511 requires a taxpayer seeking a refund for a tax assessed in violation of the Export Clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against the Government. Because we find that the Court of Appeals erred in allowing the companies to bring suit seeking a refund for the 1994–1996 taxes, we do not reach the question whether the

Court of Appeals also erred in awarding the companies interest on those amounts under 28 U. S. C. §2411. The judgment of the Court of Appeals is reversed.

It is so ordered.

Syllabus

MEADWESTVACO CORP., SUCCESSOR IN INTEREST TO MEAD CORP. *v.* ILLINOIS DEPARTMENT OF REVENUE ET AL.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 06–1413. Argued January 16, 2008—Decided April 15, 2008

A State may tax an apportioned share of the value generated by a multistate enterprise's intrastate and extrastate activities that form part of a "'unitary business.'" *Hunt-Wesson, Inc.* v. *Franchise Tax Bd. of Cal.*, 528 U. S. 458, 460. Illinois taxed a capital gain realized by Mead, an Ohio corporation that is a wholly owned subsidiary of petitioner, when Mead sold its Lexis business division. Mead paid the tax and sued in state court. The trial court found that Lexis and Mead were not unitary because they were not functionally integrated or centrally managed and enjoyed no economies of scale. It nevertheless concluded that Illinois could tax an apportioned share of Mead's capital gain because Lexis served an operational purpose in Mead's business. Affirming, the State Appellate Court found that Lexis served an operational function in Mead's business and thus did not address whether Mead and Lexis formed a unitary business.

Held:

1. The state courts erred in considering whether Lexis served an "operational purpose" in Mead's business after determining that Lexis and Mead were not unitary. Pp. 24–30.

(a) The Commerce and Due Process Clauses impose distinct but parallel limitations on a State's power to tax out-of-state activities, and each subsumes the "broad inquiry" "'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state,'" *ASARCO Inc.* v. *Idaho Tax Comm'n*, 458 U. S. 307, 315. Because the taxpayer here did business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax. Under the unitary business principle developed to answer that question, a State need not "isolate the intrastate income-producing activities from the rest of the business" but "may tax an apportioned sum of the corporation's multistate business if the business is unitary." *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U. S. 768, 772. Pp. 24–25.

(b) To address the problem arising from the emergence of multistate business enterprises such as railroad and telegraph companies—namely, that a State could not tax its fair share of such a business' value

by simply taxing the capital within its borders—the unitary business principle shifted the constitutional inquiry from the niceties of geographic accounting to the determination of a taxpayer's business unit. If the value the State wished to tax derived from a "unitary business" operated within and without the State, the State could tax an apportioned share of that business' value instead of isolating the value attributable to the intrastate operation. *E. g., Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S. 207, 223. But if the value derived from a "discrete business enterprise," *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 439, the State could not tax even an apportioned share. *E. g., Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 165–166. This principle was extended to a multistate business that lacked the "physical unity" of wires or rails but exhibited the "same unity in the use of the entire property for the specific purpose," with "the same elements of value arising from such use," *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 221; and it has justified apportioned taxation of net income, dividends, capital gain, and other intangibles. Confronting the problem of how to determine exactly when a business is unitary, this Court found in *Allied-Signal* that the "principle is not so inflexible that as new [finance] methods . . . and new [business] forms . . . evolve it cannot be modified or supplemented where appropriate," 504 U. S., at 786, and explained that situations could occur in which apportionment might be constitutional even though "the payee and the payor [were] not . . . engaged in the same unitary business," *id.*, at 787. In that context, the Court observed that an asset could form part of a taxpayer's unitary business if it served an "operational rather than an investment function" in the business, *ibid.*; and noted that *Container Corp.*, *supra*, at 180, n. 19, made the same point. Pp. 25–29.

(c) Thus, the "operational function" references in *Container Corp.* and *Allied-Signal* were not intended to modify the unitary business principle by adding a new apportionment ground. The operational function concept simply recognizes that an asset can be a part of a taxpayer's unitary business even without a "unitary relationship" between the "payor and payee." In *Allied-Signal* and in *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, the conclusion that an asset served an operational function was merely instrumental to the constitutionally relevant conclusion that the asset was a unitary part of the business conducted in the taxing State rather than a discrete asset to which the State had no claim. *Container Corp.* and *Allied-Signal* did not announce a new ground for constitutional apportionment, and the Illinois Appellate Court erred in concluding otherwise. Here, where the asset is another business, a unitary relationship's "hallmarks" are functional integration, centralized management, and economies of scale.

See *Mobil Oil Corp.*, *supra*, at 438. The trial court found each hallmark lacking in finding that Lexis was not a unitary part of Mead's business. However, the appellate court made no such determination. Relying on its operational function test, it reserved the unitary business question, which it may take up on remand. Pp. 29–30.

2. Because the alternative ground for affirmance urged by the State and its *amici*—that the record amply demonstrates that Lexis did substantial business in Illinois and that Lexis' own contacts with the State suffice to justify the apportionment of Mead's capital gain—was neither raised nor passed upon in the state courts, it will not be addressed here. The case for restraint is particularly compelling here, since the question may impact other jurisdictions' laws. Pp. 30–31.

371 Ill. App. 3d 108, 861 N. E. 2d 1131, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 32.

Beth S. Brinkmann argued the cause for petitioner. With her on the briefs were *Brian R. Matsui*, *Paul H. Frankel*, *Craig B. Fields*, and *Roberta Moseley Nero*.

Brian F. Barov, Assistant Attorney General of Illinois, argued the cause for respondents. With him on the brief were *Lisa Madigan*, Attorney General, *Michael A. Scodro*, Solicitor General, and *Jane Elinor Notz*, Deputy Solicitor General.*

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*Briefs of *amici curiae* urging reversal were filed for the Council on State Taxation et al. by *Todd A. Lard*, *Douglas L. Lindholm*, *Jan S. Amundson*, and *Quentin Riegel*; for Gannett Co. by *Scott D. Smith*; for the Tax Executives Institute, Inc., by *Eli J. Dicker*, *Shirley S. Grimmett*, and *Timothy J. McCormally*; and for the Walt Disney Co. by *Paul R. Q. Wolfson*, *Michael H. Salama*, and *Brandee A. Tilman*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Edmund G. Brown, Jr.*, Attorney General of California, *Manuel M. Medeiros*, State Solicitor General, *David Chaney*, Chief Assistant Attorney General, *Paul Gifford*, Senior Assistant Attorney General, *Gordon Burns*, Deputy Solicitor General, and *Anne Michelle Burr* and *George Spanos*, Deputy Attorneys General, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *Richard Blumenthal* of Connecticut, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Paul J.*

JUSTICE ALITO delivered the opinion of the Court.

The Due Process and Commerce Clauses forbid the States to tax "'extraterritorial values.'" *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 164 (1983); see also *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U. S. 768, 777 (1992); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 441–442 (1980). A State may, however, tax an apportioned share of the value generated by the intrastate and extrastate activities of a multistate enterprise if those activities form part of a "'unitary business.'" *Hunt-Wesson, Inc.* v. *Franchise Tax Bd. of Cal.*, 528 U. S. 458, 460 (2000); *Mobil Oil Corp.*, *supra*, at 438. We have been asked in this case to decide whether the State of Illinois constitutionally taxed an apportioned share of the capital gain realized by an out-of-state corporation on the sale of one of its business divisions. The Appellate Court of Illinois upheld the tax and affirmed a judgment in the State's favor. Because we conclude that the state courts misapprehended the principles that we have developed for determining whether a multistate business is unitary, we vacate the decision of the Appellate Court of Illinois.

I

A

Mead Corporation (Mead), an Ohio corporation, is the predecessor in interest and a wholly owned subsidiary of petitioner MeadWestvaco Corporation. From its founding

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Morrison of Kansas, *G. Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry McMaster* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Darrell V. McGraw, Jr.*, of West Virginia; and for the Multistate Tax Commission by *Sheldon H. Laskin*.

in 1846, Mead has been in the business of producing and selling paper, packaging, and school and office supplies.[1] In 1968, Mead paid $6 million to acquire a company called Data Corporation, which owned an inkjet printing technology and a full-text information retrieval system, the latter of which had originally been developed for the U. S. Air Force. Mead was interested in the inkjet printing technology because it would have complemented Mead's paper business, but the information retrieval system proved to be the more valuable asset. Over the course of many years, Mead developed that asset into the electronic research service now known as Lexis/Nexis (Lexis). In 1994, it sold Lexis to a third party for approximately $1.5 billion, realizing just over $1 billion in capital gain, which Mead used to repurchase stock, retire debt, and pay taxes.

Mead did not report any of this gain as business income on its Illinois tax returns for 1994. It took the position that the gain qualified as nonbusiness income that should be allocated to Mead's domiciliary State, Ohio, under Illinois' Income Tax Act (ITA). See Ill. Comp. Stat., ch. 35, § 5/303(a) (West 1994). The State audited Mead's returns and issued a notice of deficiency. According to the State, the ITA required Mead to treat the capital gain as business income subject to apportionment by Illinois.[2] The State assessed Mead

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[1] See Prospectus of MeadWestvaco Corporation S–3 (Mar. 19, 2003), online at http://www.sec.gov/Archives/edgar/data/1159297/000119312503085265/d424b5.htm (as visited Apr. 1, 2008, and available in Clerk of Court's case file); App. 9.

[2] When the sale of Lexis occurred in 1994, the ITA defined "business income" as "income arising from transactions and activity in the regular course of the taxpayer's trade or business," as well as "income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." Ill. Comp. Stat., ch. 35, § 5/1501(a)(1) (West 1994). This language mirrors the definition of "business income" in the Uniform Division of Income for Tax Purposes Act (UDITPA). See UDITPA § 1(a)

with approximately $4 million in additional tax and penalties. Mead paid that amount under protest and then filed this lawsuit in state court.

The case was tried to the bench. Although the court admitted expert testimony, reports, and other exhibits into evidence, see App. D to Pet. for Cert. 29a–34a, the parties' stipulations supplied most of the evidence of record regarding Mead's relationship with Lexis, see App. 9–20. We summarize those stipulations here.

B

Lexis was launched in 1973. For the first few years it was in business, it lost money, and Mead had to keep it afloat with additional capital contributions. By the late 1970's, as more attorneys began to use Lexis, the service finally turned a profit. That profit quickly became substantial. Between 1988 and 1993, Lexis made more than $800 million of the $3.8 billion in Illinois income that Mead reported. Lexis also accounted for $680 million of the $4.5 billion in business expense deductions that Mead claimed from Illinois during that period.

Lexis was subject to Mead's oversight, but Mead did not manage its day-to-day affairs. Mead was headquartered in Ohio, while a separate management team ran Lexis out of its headquarters in Illinois. The two businesses maintained separate manufacturing, sales, and distribution facilities, as well as separate accounting, legal, human resources, credit and collections, purchasing, and marketing departments.

(2002); see also §9 (subjecting "[a]ll business income" to apportionment). In 2004, the Illinois General Assembly amended the definition of "business income" to "all income that may be treated as apportionable business income under the Constitution of the United States." Pub. Act 93–840, Art. 25, §25–5 (codified at Ill. Comp. Stat., ch. 35, §5/1501(a)(1) (West 2004)); cf. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U. S. 768, 786 (1992) (declining to adopt UDITPA's "business income" test as the constitutional standard for apportionment).

Mead's involvement was generally limited to approving Lexis' annual business plan and any significant corporate transactions (such as capital expenditures, financings, mergers and acquisitions, or joint ventures) that Lexis wished to undertake. In at least one case, Mead procured new equipment for Lexis by purchasing the equipment for its own account and then leasing it to Lexis. Mead also managed Lexis' free cash, which was swept nightly from Lexis' bank accounts into an account maintained by Mead. The cash was reinvested in Lexis' business, but Mead decided how to invest it.

Neither business was required to purchase goods or services from the other. Lexis, for example, was not required to purchase its paper supply from Mead, and indeed Lexis purchased most of its paper from other suppliers. Neither received any discount on goods or services purchased from the other, and neither was a significant customer of the other.

Lexis was incorporated as one of Mead's wholly owned subsidiaries until 1980, when it was merged into Mead and became one of Mead's divisions. Mead engineered the merger so that it could offset its income with Lexis' net operating loss carryforwards. Lexis was separately reincorporated in 1985 before being merged back into Mead in 1993. Once again, tax considerations motivated each transaction. Mead also treated Lexis as a unitary business in its consolidated Illinois returns for the years 1988 through 1994, though it did so at the State's insistence and then only to avoid litigation.

Lexis was listed as one of Mead's "business segment[s]" in at least some of its annual reports and regulatory filings. Mead described itself in those reports and filings as "engaged in the electronic publishing business" and touted itself as the "developer of the world's leading electronic information retrieval services for law, patents, accounting, finance, news and business information." *Id.*, at 93, 59; App. D to Pet. for Cert. 38a.

C

Based on the stipulated facts and the other exhibits and expert testimony received into evidence, the Circuit Court of Cook County concluded that Lexis and Mead did not constitute a unitary business. The trial court reasoned that Lexis and Mead could not be unitary because they were not functionally integrated or centrally managed and enjoyed no economies of scale. *Id.*, at 35a–36a, 39a. The court nevertheless concluded that the State could tax an apportioned share of Mead's capital gain because Lexis served an "operational purpose" in Mead's business:

> "Lexis/Nexis was considered in the strategic planning of Mead, particularly in the allocation of resources. The operational purpose allowed Mead to limit the growth of Lexis/Nexis if only to limit its ability to expand or to contract through its control of its capital investment." *Id.*, at 38a–39a.

The Appellate Court of Illinois affirmed. *Mead Corp.* v. *Department of Revenue*, 371 Ill. App. 3d 108, 861 N. E. 2d 1131 (2007). The court cited several factors as evidence that Lexis served an operational function in Mead's business: (1) Lexis was wholly owned by Mead; (2) Mead had exercised its control over Lexis in various ways, such as manipulating its corporate form, approving significant capital expenditures, and retaining tax benefits and control over Lexis' free cash; and (3) Mead had described itself in its annual reports and regulatory filings as engaged in electronic publishing and as the developer of the world's leading information retrieval service. See *id.*, at 111–112, 861 N. E. 2d, at 1135–1136. Because the court found that Lexis served an operational function in Mead's business, it did not address the question whether Mead and Lexis formed a unitary business. See *id.*, at 117–118, 861 N. E. 2d, at 1140.

The Supreme Court of Illinois denied review in January 2007. *Mead Corp.* v. *Illinois Dept. of Revenue*, 222 Ill. 2d

609, 862 N. E. 2d 235 (Table). We granted certiorari. 551 U. S. 1189 (2007).

II

Petitioner contends that the trial court properly found that Lexis and Mead were not unitary and that the Appellate Court of Illinois erred in concluding that Lexis served an operational function in Mead's business. According to petitioner, the exception for apportionment of income from nonunitary businesses serving an operational function is a narrow one that does not reach a purely passive investment such as Lexis. We perceive a more fundamental error in the state courts' reasoning. In our view, the state courts erred in considering whether Lexis served an "operational purpose" in Mead's business after determining that Lexis and Mead were not unitary.

A

The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities. See *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 305–306 (1992); *Mobil Oil Corp.*, 445 U. S., at 451, n. 4 (STEVENS, J., dissenting); *Norfolk & Western R. Co.* v. *Missouri Tax Comm'n*, 390 U. S. 317, 325, n. 5 (1968). The Due Process Clause demands that there exist "'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,'" as well as a rational relationship between the tax and the "'"values connected with the taxing State."'" *Quill Corp.*, *supra*, at 306 (quoting *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954), and *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273 (1978)). The Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation. See *Container Corp.*, 463 U. S., at 170–171; *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 644 (1984). The "broad inquiry" subsumed in both constitutional require-

ments is "'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state'"—that is, "'whether the state has given anything for which it can ask return.'" *ASARCO Inc.* v. *Idaho Tax Comm'n*, 458 U. S. 307, 315 (1982) (quoting *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940)).

Where, as here, there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax. Cf. *Allied-Signal*, 504 U. S., at 778 (distinguishing *Quill Corp.*, *supra*). To answer that question, we have developed the unitary business principle. Under that principle, a State need not "isolate the intrastate income-producing activities from the rest of the business" but "may tax an apportioned sum of the corporation's multistate business if the business is unitary." *Allied-Signal*, *supra*, at 772; accord, *Hunt-Wesson*, 528 U. S., at 460; *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S. 207, 224 (1980); *Mobil Oil Corp.*, *supra*, at 442; cf. 1 J. Hellerstein & W. Hellerstein, State Taxation ¶8.07[1], p. 8–61 (3d ed. 2001–2005) (hereinafter Hellerstein & Hellerstein). The court must determine whether "intrastate and extrastate activities formed part of a single unitary business," *Mobil Oil Corp.*, *supra*, at 438–439, or whether the out-of-state values that the State seeks to tax "'derive[d] from "unrelated business activity" which constitutes a "discrete business enterprise,"'" *Allied-Signal*, *supra*, at 773 (quoting *Exxon Corp.*, *supra*, at 224, in turn quoting *Mobil Oil Corp.*, *supra*, at 439, 442; alteration in original). We traced the history of this venerable principle in *Allied-Signal*, *supra*, at 778–783, and, because it figures prominently in this case, we retrace it briefly here.

B

With the coming of the Industrial Revolution in the 19th century, the United States witnessed the emergence of its first truly multistate business enterprises. These railroad,

telegraph, and express companies presented state taxing authorities with a novel problem: A State often cannot tax its fair share of the value of a multistate business by simply taxing the capital within its borders. The whole of the enterprise is generally more valuable than the sum of its parts; were it not, its owners would simply liquidate it and sell it off in pieces. As we observed in 1876, "[t]he track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value." *State Railroad Tax Cases*, 92 U. S. 575, 608.

The unitary business principle addressed this problem by shifting the constitutional inquiry from the niceties of geographic accounting to the determination of the taxpayer's business unit. If the value the State wished to tax derived from a "unitary business" operated within and without the State, the State could tax an apportioned share of the value of that business instead of isolating the value attributable to the operation of the business within the State. *E. g.*, *Exxon Corp.*, *supra*, at 223 (citing *Moorman Mfg. Co.*, *supra*, at 273). Conversely, if the value the State wished to tax derived from a "discrete business enterprise," *Mobil Oil Corp.*, *supra*, at 439, then the State could not tax even an apportioned share of that value. *E. g.*, *Container Corp.*, *supra*, at 165–166.

We recognized as early as 1876 that the Due Process Clause did not require the States to assess trackage "in each county where it lies according to its value there." *State Railroad Tax Cases*, 92 U. S., at 608. We went so far as to opine that "[i]t may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." *Ibid.* We generalized the rule of the *State Railroad Tax Cases* in *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194 (1897). There we held that apportionment could permissibly be ap-

plied to a multistate business lacking the "physical unity" of wires or rails but exhibiting the "same unity in the use of the entire property for the specific purpose," with "the same elements of value arising from such use." *Id.*, at 221. We extended the reach of the unitary business principle further still in later cases, when we relied on it to justify the taxation by apportionment of net income, dividends, capital gain, and other intangibles. See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 117, 120–121 (1920) (net income tax); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271, 277, 280, 282–283 (1924) (franchise tax); *J. C. Penney Co.*, *supra*, at 443–445 (tax on the "privilege of declaring dividends"); cf. *Allied-Signal*, *supra*, at 780 ("[F]or constitutional purposes capital gains should be treated as no different from dividends"); see also 1 Hellerstein & Hellerstein ¶ 8.07[1] (summarizing this history).

As the unitary business principle has evolved in step with American enterprise, courts have sometimes found it difficult to identify exactly when a business is unitary. We confronted this problem most recently in *Allied-Signal*. The taxpayer there, a multistate enterprise, had realized capital gain on the disposition of its minority investment in another business. The parties' stipulation left little doubt that the taxpayer and its investee were not unitary. See 504 U. S., at 774 (observing that "the question whether the business can be called 'unitary' . . . is all but controlled by the terms of a stipulation"). The record revealed, however, that the taxpayer had used the proceeds from the liquidated investment in an ultimately unsuccessful bid to purchase a new asset that would have been used in its unitary business. See *id.*, at 776–777. From that wrinkle in the record, the New Jersey Supreme Court concluded that the taxpayer's minority interest had represented nothing more than a temporary investment of working capital awaiting deployment in the taxpayer's unitary business. See *Bendix Corp.* v. *Director, Div. of Taxation*, 125 N. J. 20, 37, 592 A. 2d 536,

545 (1991). The State went even further. It argued that, because there could be "no logical distinction between short-term investment of working capital, which all concede is apportionable, . . . and all other investments," the unitary business principle was outdated and should be jettisoned. 504 U. S., at 784.

We rejected both contentions. We concluded that "the unitary business principle is not so inflexible that as new methods of finance and new forms of business evolve it cannot be modified or supplemented where appropriate." *Id.*, at 786; see also *id.*, at 785 ("If lower courts have reached divergent results in applying the unitary business principle to different factual circumstances, that is because, as we have said, any number of variations on the unitary business theme 'are logically consistent with the underlying principles motivating the approach'" (quoting *Container Corp.*, 463 U. S., at 167)).[3] We explained that situations could occur in which apportionment might be constitutional even though "the payee and the payor [were] not . . . engaged in the same unitary business." 504 U. S., at 787. It was in that context that we observed that an asset could form part of a taxpayer's unitary business if it served an "operational rather than an investment function" in that business. *Ibid.* "Hence, for example, a State may include within the apportionable income of a nondomiciliary corporation the interest earned on short-term deposits in a bank located in another State if that income forms part of the working capital of the corporation's unitary business, notwithstanding the absence of a unitary relationship between the corporation and the bank."

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[3] The dissent agreed that the unitary business principle remained sound, 504 U. S., at 790 (opinion of O'Connor, J.), but found merit in New Jersey's premise (and the New Jersey Supreme Court's conclusion) that no logical distinction could be drawn between short- or long-term investments for purposes of unitary analysis, *id.*, at 793 ("Any distinction between short-term and long-term investments cannot be of constitutional dimension"). We need not revisit that question here.

Id., at 787–788. We observed that we had made the same point in *Container Corp.*, where we noted that "capital transactions can serve either an investment function or an operational function." 463 U. S., at 180, n. 19; cf. *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 50 (1955) (concluding that corn futures contracts in the hands of a corn refiner seeking to hedge itself against increases in corn prices are operational rather than capital assets), cited in *Container Corp.*, *supra*, at 180, n. 19.

C

As the foregoing history confirms, our references to "operational function" in *Container Corp.* and *Allied-Signal* were not intended to modify the unitary business principle by adding a new ground for apportionment. The concept of operational function simply recognizes that an asset can be a part of a taxpayer's unitary business even if what we may term a "unitary relationship" does not exist between the "payor and payee." See *Allied-Signal*, *supra*, at 791–792 (O'Connor, J., dissenting); Hellerstein, State Taxation of Corporate Income From Intangibles: *Allied-Signal* and Beyond, 48 Tax L. Rev. 739, 790 (1993) (hereinafter Hellerstein). In the example given in *Allied-Signal*, the taxpayer was not unitary with its banker, but the taxpayer's deposits (which represented working capital and thus operational assets) were clearly unitary with the taxpayer's business. In *Corn Products*, the taxpayer was not unitary with the counterparty to its hedge, but the taxpayer's futures contracts (which served to hedge against the risk of an increase in the price of a key cost input) were likewise clearly unitary with the taxpayer's business. In each case, the "payor" was not a unitary part of the taxpayer's business, but the relevant asset was. The conclusion that the asset served an operational function was merely instrumental to the constitutionally relevant conclusion that the asset was a unitary part of the business being conducted in the taxing State rather than a discrete asset to

which the State had no claim. Our decisions in *Container Corp.* and *Allied-Signal* did not announce a new ground for the constitutional apportionment of extrastate values in the absence of a unitary business. Because the Appellate Court of Illinois interpreted those decisions to the contrary, it erred.

Where, as here, the asset in question is another business, we have described the "hallmarks" of a unitary relationship as functional integration, centralized management, and economies of scale. See *Mobil Oil Corp.*, 445 U. S., at 438 (citing *Butler Brothers* v. *McColgan*, 315 U. S. 501, 506–508 (1942)); see also *Allied-Signal*, *supra*, at 783 (same); *Container Corp.*, *supra*, at 179 (same); *F. W. Woolworth Co.* v. *Taxation and Revenue Dept. of N. M.*, 458 U. S. 354, 364 (1982) (same). The trial court found each of these hallmarks lacking and concluded that Lexis was not a unitary part of Mead's business. The appellate court, however, made no such determination. Relying on its operational function test, it reserved judgment on whether Mead and Lexis formed a unitary business. The appellate court may take up that question on remand, and we express no opinion on it now.

III

The State and its *amici* argue that vacatur is not required because the judgment of the Appellate Court of Illinois may be affirmed on an alternative ground. They contend that the record amply demonstrates that Lexis did substantial business in Illinois and that Lexis' own contacts with the State suffice to justify the apportionment of Mead's capital gain. See Brief for Respondents 18–25, 46–49; Brief for Multistate Tax Commission as *Amicus Curiae* 19–29. The State and its *amici* invite us to recognize a new ground for the constitutional apportionment of intangibles based on the taxing State's contacts with the capital asset rather than the taxpayer.

We decline this invitation because the question that the State and its *amici* call upon us to answer was neither raised nor passed upon in the state courts. It also was not addressed in the State's brief in opposition to the petition. We typically will not address a question under these circumstances even if the answer would afford an alternative ground for affirmance. See *Glover* v. *United States*, 531 U. S. 198, 205 (2001) (citing *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 646 (1992)); *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 578 (2001) (THOMAS, J., concurring in part and concurring in judgment).

The case for restraint is particularly compelling here, since the question may impact the law of other jurisdictions. The States of Ohio and New York, for example, have both adopted the rationale for apportionment that respondents urge us to recognize today. See Ohio Rev. Code Ann. §§5733.051(E)–(F) (West 2007); N. Y. Tax Law Ann. §210, subd. 3, par. (b) (West Supp. 2008); see also *Allied-Signal Inc.* v. *Department of Taxation & Finance*, 229 App. Div. 2d 759, 762, 645 N. Y. S. 2d 895, 898 (3d Dept. 1996) (finding that a "sufficient nexus existed between New York and the dividend and capital gain income" of the nondomiciliary parent because "the corporations generating the income taxed . . . each have their own connection with the taxing jurisdiction"); 1 Hellerstein & Hellerstein ¶9.11[2][a]. Neither Ohio nor New York has appeared as an *amicus* in this case, and neither was on notice that the constitutionality of its tax scheme was at issue, the question having been raised for the first time in the State's brief on the merits. So postured, the question is best left for another day.[4]

[4] Resolving this question now probably would not spare the State a remand. The State calculated petitioner's tax liability by applying the State's tax rate to Mead's apportioned business income, which in turn was calculated by applying Mead's apportionment percentage to its apportionable business income. See App. 28; Ill. Comp. Stat., ch. 35, §5/304(a) (West

IV

The judgment of the Appellate Court of Illinois is vacated, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

Although I join the Court's opinion, I write separately to express my serious doubt that the Constitution permits us to adjudicate cases in this area. Despite the Court's repeated holdings that "[t]he Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values,'" *ante*, at 19 (quoting *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 164 (1983)), I am not fully convinced of that proposition.

To the extent that our decisions addressing state taxation of multistate enterprises rely on the negative Commerce

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1994). But if a constitutionally sufficient link between the State and the value it wishes to tax is founded on the State's contacts with Lexis rather than Mead, then presumably the apportioned tax base should be determined by applying the State's four-factor apportionment formula not to Mead but to Lexis. Naturally, applying the formula to Lexis rather than Mead would yield a different apportionment percentage. See Brief for Multistate Tax Commission as *Amicus Curiae* 18–19, and n. 9; see also Hellerstein 802–803.

The Multistate Tax Commission seems to argue that the difference would not affect the result because application of the formula to Lexis would have yielded a higher apportionment percentage. See Brief for Multistate Tax Commission 18–19. *Amicus* argues, in other words, that petitioner has no cause to complain because it caught a break in the incorrect application of a lower apportionment percentage. *Amicus*' argument assumes what we are in no position to decide: that Lexis' own apportioned tax base was properly calculated. Had petitioner been on notice that Lexis, rather than Mead, would supply the relevant apportionment percentage, it might have persuaded the state courts that Lexis' apportionment percentage should have been even lower than Mead's. The State's untimely resort to an alternative ground for affirmance may have denied petitioner a fair opportunity to make that argument.

Clause, I would overrule them. As I have previously explained, this Court's negative Commerce Clause jurisprudence "has no basis in the Constitution and has proved unworkable in practice." *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 349 (2007) (THOMAS, J., concurring in judgment).

The Court's cases in this area have not, however, rested solely on the Commerce Clause. The Court has long recognized that the Due Process Clause of the Fourteenth Amendment may also limit States' authority to tax multistate businesses. See *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 226 (1897) (concluding that because "[t]he property taxed has its actual situs in the State and is, therefore, subject to the jurisdiction, and . . . regulation by the state legislature," the tax at issue did not "amoun[t] to a taking of property without due process of law"). I agree that the Due Process Clause requires a jurisdictional nexus or, as this Court has stated, "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954); see *ante*, at 24. But apart from that requirement, I am concerned that further constraints—particularly those limiting the *degree* to which a State may tax a multistate enterprise—require us to read into the Due Process Clause yet another unenumerated, substantive right. Cf. *Troxel* v. *Granville*, 530 U. S. 57, 80 (2000) (THOMAS, J., concurring in judgment) (leaving open the question whether "our substantive due process cases were wrongly decided and . . . the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights").

Today the Court applies the additional requirement that there exist "a rational relationship between the tax and the values connected with the taxing State." *Ante*, at 24 (internal quotation marks omitted); see also *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273 (1978) (requiring that "the income attributed to the State for tax purposes . . . be rationally

related to 'values connected with the taxing State'" (quoting *Norfolk & Western R. Co.* v. *Missouri Tax Comm'n*, 390 U. S. 317, 325 (1968))). In my view, however, it is difficult to characterize this requirement as providing an exclusively procedural safeguard against the deprivation of property. Scrutinizing the amount of multistate income a State may apportion for tax purposes comes perilously close to evaluating the excessiveness of the State's taxing scheme—a question the Fourteenth Amendment does not grant us the authority to adjudicate. See, *e. g.*, *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 562 (1935) ("To condemn a levy on the sole ground that it is excessive would be to usurp a power vested not in the courts but in the legislature, and to exercise the usurped power arbitrarily by substituting our conceptions of public policy for those of the legislative body"). Indeed, divining from the Fourteenth Amendment a right against disproportionate taxation bears a striking resemblance to our long-rejected *Lochner*-era precedents. See, *e. g.*, *Lochner* v. *New York*, 198 U. S. 45, 56–58 (1905) (invalidating a state statute as an "unreasonable, unnecessary and arbitrary interference with the right of the individual . . . to enter into those contracts . . . which may seem to him appropriate or necessary"). Moreover, the Court's involvement in this area is wholly unnecessary given Congress' undisputed authority to resolve income apportionment issues by virtue of its power to regulate commerce "among the several States." See U. S. Const., Art. I, §8, cl. 3.

Although I believe that the Court should reconsider its constitutional authority to adjudicate these kinds of cases, neither party has asked us to do so here, and the Court's decision today faithfully applies our precedents. I therefore concur.

Syllabus

BAZE ET AL. *v.* REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 07–5439. Argued January 7, 2008—Decided April 16, 2008

Lethal injection is used for capital punishment by the Federal Government and 36 States, at least 30 of which (including Kentucky) use the same combination of three drugs: The first, sodium thiopental, induces unconsciousness when given in the specified amounts and thereby ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs, pancuronium bromide and potassium chloride. Among other things, Kentucky's lethal injection protocol reserves to qualified personnel having at least one year's professional experience the responsibility for inserting the intravenous (IV) catheters into the prisoner, leaving it to others to mix the drugs and load them into syringes; specifies that the warden and deputy warden will remain in the execution chamber to observe the prisoner and watch for any IV problems while the execution team administers the drugs from another room; and mandates that if, as determined by the warden and deputy, the prisoner is not unconscious within 60 seconds after the sodium thiopental's delivery, a new dose will be given at a secondary injection site before the second and third drugs are administered.

Petitioners, convicted murderers sentenced to death in Kentucky state court, filed suit asserting that the Commonwealth's lethal injection protocol violates the Eighth Amendment's ban on "cruel and unusual punishments." The state trial court held extensive hearings and entered detailed factfindings and conclusions of law, ruling that there was minimal risk of various of petitioners' claims of improper administration of the protocol, and upholding it as constitutional. The Kentucky Supreme Court affirmed, holding that the protocol does not violate the Eighth Amendment because it does not create a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death.

Held: The judgment is affirmed.

217 S. W. 3d 207, affirmed.

CHIEF JUSTICE ROBERTS, joined by JUSTICE KENNEDY and JUSTICE ALITO, concluded that Kentucky's lethal injection protocol satisfies the Eighth Amendment. Pp. 47–63.

1. To constitute cruel and unusual punishment, an execution method must present a "substantial" or "objectively intolerable" risk of serious

harm. A State's refusal to adopt proffered alternative procedures may violate the Eighth Amendment only where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. Pp. 47–52.

(a) This Court has upheld capital punishment as constitutional. See *Gregg* v. *Georgia*, 428 U. S. 153, 177. Because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain. Petitioners contend that the Eighth Amendment prohibits procedures that create an "unnecessary risk" of pain, while Kentucky urges the Court to approve the "'substantial risk'" test used below. Pp. 47–48.

(b) This Court has held that the Eighth Amendment forbids "punishments of torture, . . . and all others in the same line of unnecessary cruelty," *Wilkerson* v. *Utah*, 99 U. S. 130, 136, such as disemboweling, beheading, quartering, dissecting, and burning alive, all of which share the deliberate infliction of pain for the sake of pain, *id.*, at 135. Observing also that "[p]unishments are cruel when they involve torture or a lingering death[,] . . . something inhuman and barbarous [and] . . . more than the mere extinguishment of life," the Court has emphasized that an electrocution statute it was upholding "was passed in the effort to devise a more humane method of reaching the result." *In re Kemmler*, 136 U. S. 436, 447. Pp. 48–49.

(c) Although conceding that an execution under Kentucky's procedures would be humane and constitutional if performed properly, petitioners claim that there is a significant risk that the procedures will *not* be properly followed—particularly, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered. Subjecting individuals to a substantial risk of future harm can be cruel and unusual punishment if the conditions presenting the risk are "sure or very likely to cause serious illness and needless suffering" and give rise to "sufficiently imminent dangers." *Helling* v. *McKinney*, 509 U. S. 25, 33, 34–35. To prevail, such a claim must present a "substantial risk of serious harm," an "objectively intolerable risk of harm." *Farmer* v. *Brennan*, 511 U. S. 825, 842, 846, and n. 9. For example, the Court has held that an isolated mishap alone does not violate the Eighth Amendment, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463–464, because such an event, while regrettable, does not suggest cruelty or a "substantial risk of serious harm." Pp. 49–50.

(d) Petitioners' primary contention is that the risks they have identified can be eliminated by adopting certain alternative procedures. Because allowing a condemned prisoner to challenge a State's execution

method merely by showing a slightly or marginally safer alternative finds no support in this Court's cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing execution procedures, petitioners' proposed "unnecessary risk" standard is rejected in favor of *Farmer*'s "substantial risk of serious harm" test. To effectively address such a substantial risk, a proffered alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. A State's refusal to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for its current execution method, can be viewed as "cruel and unusual." Pp. 51–52.

2. Petitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment. Pp. 53–61.

(a) It is uncontested that failing a proper dose of sodium thiopental to render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and of pain from potassium chloride. It is, however, difficult to regard a practice as "objectively intolerable" when it is in fact widely tolerated. Probative but not conclusive in this regard is the consensus among the Federal Government and the States that have adopted lethal injection and the specific three-drug combination Kentucky uses. Pp. 53–54.

(b) In light of the safeguards Kentucky's protocol puts in place, the risks of administering an inadequate sodium thiopental dose identified by petitioners are not so substantial or imminent as to amount to an Eighth Amendment violation. The charge that Kentucky employs untrained personnel unqualified to calculate and mix an adequate dose was answered by the state trial court's finding, substantiated by expert testimony, that there would be minimal risk of improper mixing if the manufacturers' thiopental package insert instructions were followed. Likewise, the IV line problems alleged by petitioners do not establish a sufficiently substantial risk because IV team members must have at least one year of relevant professional experience, and the presence of the warden and deputy warden in the execution chamber allows them to watch for IV problems. If an insufficient dose is initially administered through the primary IV site, an additional dose can be given through the secondary site before the last two drugs are injected. Pp. 54–56.

(c) Nor does Kentucky's failure to adopt petitioners' proposed alternatives demonstrate that the state execution procedure is cruel and unusual. Kentucky's continued use of the three-drug protocol cannot be

viewed as posing an "objectively intolerable risk" when no other State has adopted the one-drug method and petitioners have proffered no study showing that it is an equally effective manner of imposing a death sentence. Petitioners contend that Kentucky should omit pancuronium bromide because it serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of sodium thiopental. The state trial court specifically found that pancuronium bromide serves two purposes: (1) preventing involuntary convulsions or seizures during unconsciousness, thereby preserving the procedure's dignity, and (2) hastening death. Petitioners assert that their barbiturate-only protocol is used routinely by veterinarians for putting animals to sleep and that 23 States bar veterinarians from using a neuromuscular paralytic agent like pancuronium bromide. These arguments overlook the States' legitimate interest in providing for a quick, certain death, and in any event, veterinary practice for animals is not an appropriate guide for humane practices for humans. Petitioners charge that Kentucky's protocol lacks a systematic mechanism, such as a Bispectral Index monitor, blood pressure cuff, or electrocardiogram, for monitoring the prisoner's "anesthetic depth." But expert testimony shows both that a proper thiopental dose obviates the concern that a prisoner will not be sufficiently sedated, and that each of the proposed alternatives presents its own concerns. Pp. 56–61.

JUSTICE STEVENS concluded that instead of ending the controversy, this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of pancuronium bromide, but also about the justification for the death penalty itself. States wishing to decrease the risk that future litigation will delay executions or invalidate their protocol would do well to reconsider their continued use of pancuronium bromide. Moreover, although experience demonstrates that imposing that penalty constitutes the pointless and needless extinction of life with only negligible social or public returns, this conclusion does not justify a refusal to respect this Court's precedents upholding the death penalty and establishing a framework for evaluating the constitutionality of particular execution methods, under which petitioners' evidence fails to prove that Kentucky's protocol violates the Eighth Amendment. Pp. 71–87.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concluded that the plurality's formulation of the governing standard finds no support in the original understanding of the Cruel and Unusual Punishments Clause or in this Court's previous method-of-execution cases; casts constitutional doubt on long-accepted methods of execution; and injects the Court into matters it has no institutional capacity to resolve. The historical practices leading to the Clause's inclusion in the Bill of Rights,

Syllabus

the views of early commentators on the Constitution, and this Court's cases, see, *e. g.*, *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136, all demonstrate that an execution method violates the Eighth Amendment only if it is deliberately designed to inflict pain. Judged under that standard, this is an easy case: Because it is undisputed that Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane, not to add elements of terror, pain, or disgrace to the death penalty, petitioners' challenge must fail. Pp. 94–107.

JUSTICE BREYER concluded that there cannot be found, either in the record or in the readily available literature, sufficient grounds to believe that Kentucky's lethal injection method creates a significant risk of unnecessary suffering. Although the death penalty has serious risks—*e. g.*, that the wrong person may be executed, that unwarranted animus about the victims' race, for example, may play a role, and that those convicted will find themselves on death row for many years—the penalty's lawfulness is not before the Court. And petitioners' proof and evidence, while giving rise to legitimate concern, do not show that Kentucky's execution method amounts to "cruel and unusual punishmen[t]." Pp. 107–113.

ROBERTS, C. J., announced the judgment of the Court and delivered an opinion, in which KENNEDY and ALITO, JJ., joined. ALITO, J., filed a concurring opinion, *post*, p. 63. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 71. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 87. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 94. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 107. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 113.

Donald B. Verrilli, Jr., argued the cause for petitioners. With him on the briefs were *David M. Barron*, *Ginger D. Anders*, and *John Anthony Palombi*.

Roy T. Englert, Jr., argued the cause for respondents. On the brief were *Gregory D. Stumbo*, Attorney General of Kentucky, *David A. Smith*, Assistant Attorney General, *Jeffrey T. Middendorf*, and *John C. Cummings*.

Deputy Solicitor General Garre argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Solicitor General Clement*, *As-*

sistant Attorney General Fisher, Kannon K. Shanmugam, and *Robert J. Erickson.**

CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered an opinion, in which JUSTICE KENNEDY and JUSTICE ALITO join.

Like 35 other States and the Federal Government, Kentucky has chosen to impose capital punishment for certain crimes. As is true with respect to each of these States and the Federal Government, Kentucky has altered its method

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *John Holdridge, John W. Whitehead,* and *Steven R. Shapiro;* for the Fordham University School of Law, Louis Stein Center for Law and Ethics, by *Alison J. Nathan, Bruce A. Green,* and *Bruce V. Spiva;* for Human Rights Watch by *Andrew J. Pincus* and *Charles A. Rothfeld;* and for Michael Morales et al. by *Elisabeth Semel* and *Ty Alper.*

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Greg Abbott,* Attorney General of Texas, *Kent C. Sullivan,* First Assistant Attorney General, *Eric J. R. Nichols,* Deputy Attorney General for Criminal Justice, *R. Ted Cruz,* Solicitor General, and *Sean D. Jordan,* Deputy Solicitor General, by *Kevin T. Kane,* Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Paul J. Morrison* of Kansas, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Catherine Cortez Masto* of Nevada, *W. A. Drew Edmondson* of Oklahoma, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.,* of Tennessee, *Mark L. Shurtleff* of Utah, and *Bruce A. Salzburg* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Briefs of *amici curiae* were filed for the American Association of Jewish Lawyers and Jurists by *Nathan Lewin, Alyza D. Lewin, Stephen R. Greenwald,* and *Robert L. Weinberg;* for the American Society of Anesthesiologists by *Lawrence J. Fox* and *Lisa S. McCalmont;* for the Anesthesia Awareness Campaign, Inc., by *Richard M. Wyner;* for Critical Care Providers et al. by *Bradley S. Phillips, Paul Watford,* and *Julie D. Cantor;* and for Dr. Kevin Concannon et al. by *Simona G. Strauss.*

of execution over time to more humane means of carrying out the sentence. That progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty.

Petitioners in this case—each convicted of double homicide—acknowledge that the lethal injection procedure, if applied as intended, will result in a humane death. They nevertheless contend that the lethal injection protocol is unconstitutional under the Eighth Amendment's ban on "cruel and unusual punishments," because of the risk that the protocol's terms might not be properly followed, resulting in significant pain. They propose an alternative protocol, one that they concede has not been adopted by any State and has never been tried.

The trial court held extensive hearings and entered detailed findings of fact and conclusions of law. It recognized that "[t]here are no methods of legal execution that are satisfactory to those who oppose the death penalty on moral, religious, or societal grounds," but concluded that Kentucky's procedure "complies with the constitutional requirements against cruel and unusual punishment." App. 769. The State Supreme Court affirmed. We too agree that petitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment. The judgment below is affirmed.

I

A

By the middle of the 19th century, "hanging was the 'nearly universal form of execution' in the United States." *Campbell* v. *Wood*, 511 U. S. 1119 (1994) (Blackmun, J., dissenting from denial of certiorari) (quoting *State* v. *Frampton*, 95 Wash. 2d 469, 492, 627 P. 2d 922, 934 (1981)); Denno, Getting to Death: Are Executions Constitutional? 82 Iowa

L. Rev. 319, 364 (1997) (counting 48 States and Territories that employed hanging as a method of execution). In 1888, following the recommendation of a commission empaneled by the Governor to find "'the most humane and practical method known to modern science of carrying into effect the sentence of death,'" New York became the first State to authorize electrocution as a form of capital punishment. *Glass* v. *Louisiana*, 471 U. S. 1080, 1082, and n. 4 (1985) (Brennan, J., dissenting from denial of certiorari); Denno, *supra*, at 373. By 1915, 11 other States had followed suit, motivated by the "well-grounded belief that electrocution is less painful and more humane than hanging." *Malloy* v. *South Carolina*, 237 U. S. 180, 185 (1915).

Electrocution remained the predominant mode of execution for nearly a century, although several methods, including hanging, firing squad, and lethal gas were in use at one time. Brief for Fordham University School of Law, Louis Stein Center for Law and Ethics, as *Amicus Curiae* 5–9 (hereinafter Fordham Brief). Following the 9-year hiatus in executions that ended with our decision in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), however, state legislatures began responding to public calls to reexamine electrocution as a means of ensuring a humane death. See S. Banner, The Death Penalty: An American History 192–193, 296–297 (2002). In 1977, legislators in Oklahoma, after consulting with the head of the anesthesiology department at the University of Oklahoma College of Medicine, introduced the first bill proposing lethal injection as the State's method of execution. See Brief for Petitioners 4; Fordham Brief 21–22. A total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States.[1] It is also the method used by the

[1] Twenty-seven of the thirty-six States that currently provide for capital punishment require execution by lethal injection as the sole method. See Ariz. Rev. Stat. Ann. §13–704 (West 2001); Ark. Code Ann. §5–4–617

Federal Government. See 18 U. S. C. §3591 *et seq.* (2000 ed. and Supp. V); App. to Brief for United States as *Amicus Curiae* 1a–6a (lethal injection protocol used by the Federal Bureau of Prisons).

(2006); Colo. Rev. Stat. Ann. §18–1.3–1202 (2007); Conn. Gen. Stat. §54–100 (2007); Del. Code Ann., Tit. 11, §4209 (2006 Supp.); Ga. Code Ann. §17–10–38 (2004); Ill. Comp. Stat., ch. 725, §5/119–5 (West 2006); Ind. Code §35–38–6–1 (West 2004); Kan. Stat. Ann. §22–4001 (2006 Cum. Supp.); Ky. Rev. Stat. Ann. §431.220 (West 2006); La. Stat. Ann. §15:569 (West 2005); Md. Crim. Law Code Ann. §2–303 (Lexis Supp. 2007); Miss. Code Ann. §99–19–51 (2007); Mont. Code Ann. §46–19–103 (2007); Nev. Rev. Stat. §176.355 (2007); N. M. Stat. Ann. §31–14–11 (2000); N. Y. Correc. Law Ann. §658 (West 2003) (held unconstitutional in *People* v. *LaValle*, 3 N. Y. 3d 88, 130–131, 817 N. E. 2d 341, 367 (2004)); N. C. Gen. Stat. Ann. §15–187 (Lexis 2007); Ohio Rev. Code Ann. §2949.22 (Lexis 2006); Okla. Stat., Tit. 22, §1014 (West 2001); Ore. Rev. Stat. §137.473 (2003); Pa. Stat. Ann., Tit. 61, §3004 (Purdon 1999); S. D. Codified Laws §23A–27A–32 (Supp. 2007); Tenn. Code Ann. §40–23–114 (2006); Tex. Code Crim. Proc. Ann., Art. 43.14 (Vernon 2006 Supp. Pamphlet); Utah Code Ann. §77–18–5.5 (Lexis Supp. 2007); Wyo. Stat. Ann. §7–13–904 (2007). Nine States allow for lethal injection in addition to an alternative method, such as electrocution, see Ala. Code §§15–18–82 to 82.1 (Supp. 2007); Fla. Stat. §922.105 (2006); S. C. Code Ann. §24–3–530 (2007); Va. Code Ann. §53.1–234 (Lexis Supp. 2007), hanging, see N. H. Rev. Stat. Ann. §630:5 (2007); Wash. Rev. Code §10.95.180 (2006), lethal gas, see Cal. Penal Code Ann. §3604 (West 2000); Mo. Rev. Stat. §546.720 (2007 Cum. Supp.), or firing squad, see Idaho Code §19–2716 (Lexis 2004). Nebraska is the only State whose statutes specify electrocution as the sole method of execution, see Neb. Rev. Stat. §29–2532 (1995), but the Nebraska Supreme Court recently struck down that method under the Nebraska Constitution, see *State* v. *Mata*, 275 Neb. 1, 39, 745 N. W. 2d 229, 278 (2008).

Although it is undisputed that the States using lethal injection adopted the protocol first developed by Oklahoma without significant independent review of the procedure, it is equally undisputed that, in moving to lethal injection, the States were motivated by a desire to find a more humane alternative to then-existing methods. See Fordham Brief 2–3. In this regard, Kentucky was no different. See *id.*, at 29–30 (quoting statement by the State Representative who sponsored the bill to replace electrocution with lethal injection in Kentucky: "[I]f we are going to do capital punishment, it needs to be done in the most humane manner" (internal quotation marks omitted)).

Of these 36 States, at least 30 (including Kentucky) use the same combination of three drugs in their lethal injection protocols. See *Workman* v. *Bredesen*, 486 F. 3d 896, 902 (CA6 2007). The first drug, sodium thiopental (also known as Pentothol), is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection. App. 762–763, 631–632. The second drug, pancuronium bromide (also known as Pavulon), is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. *Id.*, at 763. Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest. *Ibid.* The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs. *Id.*, at 493–494, 541, 558–559.

B

Kentucky replaced electrocution with lethal injection in 1998. 1998 Ky. Acts ch. 220, p. 777. The Kentucky statute does not specify the drugs or categories of drugs to be used during an execution, instead mandating that "every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death." Ky. Rev. Stat. Ann. §431.220(1)(a) (West 2006). Prisoners sentenced before 1998 have the option of electing either electrocution or lethal injection, but lethal injection is the default if—as is the case with petitioners—the prisoner refuses to make a choice at least 20 days before the scheduled execution. §431.220(1)(b). If a court invalidates Kentucky's lethal injection method, Kentucky law provides that the method of execution will revert to electrocution. §431.223.

Shortly after the adoption of lethal injection, officials working for the Kentucky Department of Corrections set

about developing a written protocol to comply with the requirements of § 431.220(1)(a). Kentucky's protocol called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. In 2004, as a result of this litigation, the department chose to increase the amount of sodium thiopental from 2 grams to 3 grams. App. 762–763, 768. Between injections, members of the execution team flush the intravenous (IV) lines with 25 milligrams of saline to prevent clogging of the lines by precipitates that may form when residual sodium thiopental comes into contact with pancuronium bromide. *Id.*, at 761, 763–764. The protocol reserves responsibility for inserting the IV catheters to qualified personnel having at least one year of professional experience. *Id.*, at 984. Currently, Kentucky uses a certified phlebotomist and an emergency medical technician (EMT) to perform the venipunctures necessary for the catheters. *Id.*, at 761–762. They have up to one hour to establish both primary and secondary peripheral IV sites in the arm, hand, leg, or foot of the inmate. *Id.*, at 975–976. Other personnel are responsible for mixing the solutions containing the three drugs and loading them into syringes. *Id.*, at 761.

Kentucky's execution facilities consist of the execution chamber, a control room separated by a one-way window, and a witness room. *Id.*, at 203. The warden and deputy warden remain in the execution chamber with the prisoner, who is strapped to a gurney. The execution team administers the drugs remotely from the control room through five feet of IV tubing. *Id.*, at 286. If, as determined by the warden and deputy warden through visual inspection, the prisoner is not unconscious within 60 seconds following the delivery of the sodium thiopental to the primary IV site, a new 3-gram dose of thiopental is administered to the secondary site before injecting the pancuronium and potassium chloride. *Id.*, at 978–979. In addition to ensuring that the first dose of thiopental is successfully administered, the war-

den and deputy warden also watch for any problems with the IV catheters and tubing.

A physician is present to assist in any effort to revive the prisoner in the event of a last-minute stay of execution. *Id.*, at 764. By statute, however, the physician is prohibited from participating in the "conduct of an execution," except to certify the cause of death. Ky. Rev. Stat. Ann. § 431.220(3). An electrocardiogram (EKG) verifies the death of the prisoner. App. 764. Only one Kentucky prisoner, Eddie Lee Harper, has been executed since the Commonwealth adopted lethal injection. There were no reported problems at Harper's execution.

C

Petitioners Ralph Baze and Thomas C. Bowling were each convicted of two counts of capital murder and sentenced to death. The Kentucky Supreme Court upheld their convictions and sentences on direct appeal. See *Baze* v. *Commonwealth*, 965 S. W. 2d 817, 819–820, 826 (1997), cert. denied, 523 U. S. 1083 (1998); *Bowling* v. *Commonwealth*, 873 S. W. 2d 175, 176–177, 182 (1993), cert. denied, 513 U. S. 862 (1994).

After exhausting their state and federal collateral remedies, Baze and Bowling sued three state officials in the Franklin Circuit Court for the Commonwealth of Kentucky, seeking to have Kentucky's lethal injection protocol declared unconstitutional. After a 7-day bench trial during which the trial court received the testimony of approximately 20 witnesses, including numerous experts, the court upheld the protocol, finding there to be minimal risk of various claims of improper administration of the protocol. App. 765–769. On appeal, the Kentucky Supreme Court stated that a method of execution violates the Eighth Amendment when it "creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death." 217 S. W. 3d 207, 209 (2006). Applying that standard, the court affirmed. *Id.*, at 212.

We granted certiorari to determine whether Kentucky's lethal injection protocol satisfies the Eighth Amendment. 551 U. S. 1192, amended, 552 U. S. 945 (2007). We hold that it does.

II

The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, see *Robinson* v. *California*, 370 U. S. 660, 666 (1962), provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. See 428 U. S., at 177 (joint opinion of Stewart, Powell, and STEVENS, JJ.). It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

Petitioners do not claim that it does. Rather, they contend that the Eighth Amendment prohibits procedures that create an "unnecessary risk" of pain. Brief for Petitioners 38. Specifically, they argue that courts must evaluate "(a) the severity of pain risked, (b) the likelihood of that pain occurring, and (c) the extent to which alternative means are feasible, either by modifying existing execution procedures or adopting alternative procedures." *Ibid.* Petitioners envision that the quantum of risk necessary to make out an Eighth Amendment claim will vary according to the severity of the pain and the availability of alternatives, Reply Brief for Petitioners 23–24, n. 9, but that the risk must be "significant" to trigger Eighth Amendment scrutiny, see Brief for Petitioners 39–40; Reply Brief for Petitioners 25–26.

Kentucky responds that this "unnecessary risk" standard is tantamount to a requirement that States adopt the "'least risk'" alternative in carrying out an execution, a standard

the Commonwealth contends will cast recurring constitutional doubt on any procedure adopted by the States. Brief for Respondents 29, 35. Instead, Kentucky urges the Court to approve the "'substantial risk'" test used by the courts below. *Id.*, at 34–35.

A

This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment. In *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), we upheld a sentence to death by firing squad imposed by a territorial court, rejecting the argument that such a sentence constituted cruel and unusual punishment. *Id.*, at 134–135. We noted there the difficulty of "defin[ing] with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." *Id.*, at 135–136. Rather than undertake such an effort, the *Wilkerson* Court simply noted that "it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden" by the Eighth Amendment. *Id.*, at 136. By way of example, the Court cited cases from England in which "terror, pain, or disgrace were sometimes superadded" to the sentence, such as where the condemned was "embowelled alive, beheaded, and quartered," or instances of "public dissection in murder, and burning alive." *Id.*, at 135. In contrast, we observed that the firing squad was routinely used as a method of execution for military officers. *Id.*, at 134. What each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain—"superadd[ing]" pain to the death sentence through torture and the like.

We carried these principles further in *In re Kemmler*, 136 U. S. 436 (1890). There we rejected an opportunity to incorporate the Eighth Amendment against the States in a challenge to the first execution by electrocution, to be carried

out by the State of New York. *Id.*, at 449. In passing over that question, however, we observed: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.*, at 447. We noted that the New York statute adopting electrocution as a method of execution "was passed in the effort to devise a more humane method of reaching the result." *Ibid.*

B

Petitioners do not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel or wanton infliction of pain. Quite the contrary, they concede that "if performed properly," an execution carried out under Kentucky's procedures would be "humane and constitutional." Brief for Petitioners 31. That is because, as counsel for petitioners admitted at oral argument, proper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride. See Tr. of Oral Arg. 5; App. 493–494 (testimony of petitioners' expert that, if sodium thiopental is "properly administered" under the protocol, "[i]n virtually every case, then that would be a humane death").

Instead, petitioners claim that there is a significant risk that the procedures will *not* be properly followed—in particular, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered. Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure vio-

lates the Eighth Amendment, however, the conditions presenting the risk must be "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently *imminent* dangers." *Helling* v. *McKinney*, 509 U. S. 25, 33, 34–35 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer* v. *Brennan*, 511 U. S. 825, 842, 846, and n. 9 (1994).

Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. In *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that "[a]ccidents happen for which no man is to blame," *id.*, at 462, and concluded that such "an accident, with no suggestion of malevolence," *id.*, at 463, did not give rise to an Eighth Amendment violation, *id.*, at 463–464.

As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case. *Id.*, at 471 (concurring opinion). In terms of our present Eighth Amendment analysis, such a situation—unlike an "innocent misadventure," *id.*, at 470—would demonstrate an "objectively intolerable risk of harm" that officials may not ignore. See *Farmer*, 511 U. S., at 846, and n. 9. In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm." *Id.*, at 842.

C

Much of petitioners' case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as a one-drug protocol that dispenses with the use of pancuronium and potassium chloride, and additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered. Given what our cases have said about the nature of the risk of harm that is actionable under the Eighth Amendment, a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative.

Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death. See *Bell* v. *Wolfish*, 441 U. S. 520, 562 (1979) ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government"). Accordingly, we reject petitioners' proposed "unnecessary risk" standard, as well as the dissent's "untoward" risk variation. See *post*, at 114, 123 (opinion of GINSBURG, J.).[2]

[2]The difficulties inherent in such approaches are exemplified by the controversy surrounding the study of lethal injection published in the April 2005 edition of the British medical journal the Lancet. After examining thiopental concentrations in toxicology reports based on blood samples drawn from 49 executed inmates, the study concluded that "most of the

Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." *Farmer*, *supra*, at 842. To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.[3]

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executed inmates had concentrations that would not be expected to produce a surgical plane of anaesthesia, and 21 (43%) had concentrations consistent with consciousness." Koniaris, Zimmers, Lubarsky, & Sheldon, Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412, 1412–1413. The study was widely cited around the country in motions to stay executions and briefs on the merits. See, *e. g.*, Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Ford. L. Rev. 49, 105, n. 366 (2007) (collecting cases in which claimants cited the Lancet study). But shortly after the Lancet study appeared, peer responses by seven medical researchers criticized the methodology supporting the original conclusions. See Groner, Inadequate Anaesthesia in Lethal Injection for Execution, 366 Lancet 1073, 1073–1074 (Sept. 2005). These researchers noted that because the blood samples were taken "several hours to days after" the inmates' deaths, the postmortem concentrations of thiopental—a fat-soluble compound that passively diffuses from blood into tissue—could not be relied on as accurate indicators for concentrations during life. *Id.*, at 1073. The authors of the original study responded to defend their methodology. *Id.*, at 1074–1076. See also *post*, at 108–110 (BREYER, J., concurring in judgment).

We do not purport to take sides in this dispute. We cite it only to confirm that a "best practices" approach, calling for the weighing of relative risks without some measure of deference to a State's choice of execution procedures, would involve the courts in debatable matters far exceeding their expertise.

[3] JUSTICE THOMAS agrees that courts have neither the authority nor the expertise to function as boards of inquiry determining best practices for executions, see *post*, at 101 (opinion concurring in judgment) (quoting this opinion); *post*, at 105–106, but contends that the standard we adopt inevit-

III

In applying these standards to the facts of this case, we note at the outset that it is difficult to regard a practice as "objectively intolerable" when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. The Federal Government uses lethal injection as well. See *supra*, at 42–43, and n. 1. This broad consensus goes not just to the method of execution, but also to the specific three-drug combination used by Kentucky. Thirty States, as well as the Federal Government, use a series of sodium thiopental, pancuronium bromide, and potassium chloride, in varying amounts. See *supra*, at 44. No State uses or has ever used the alternative one-drug protocol belatedly urged by petitioners. This consensus is probative but not conclusive with respect to that aspect of the alternatives proposed by petitioners.

In order to meet their "heavy burden" of showing that Kentucky's procedure is "cruelly inhumane," *Gregg*, 428 U. S., at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.), petitioners point to numerous aspects of the protocol that they contend create opportunities for error. Their claim hinges on the improper administration of the first drug, sodium thiopental. It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride. See Tr. of Oral Arg. 27. We agree with the state trial court and State Supreme Court, however, that petitioners

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ably poses such concerns. In our view, those concerns are effectively addressed by the threshold requirement reflected in our cases of a "'substantial risk of serious harm'" or an "'objectively intolerable risk of harm,'" see *supra*, at 50, and by the substantive requirements in the articulated standard.

have not shown that the risk of an inadequate dose of the first drug is substantial. And we reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified.

A

Petitioners contend that there is a risk of improper administration of thiopental because the doses are difficult to mix into solution form and load into syringes; because the protocol fails to establish a rate of injection, which could lead to a failure of the IV; because it is possible that the IV catheters will infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein; because of inadequate facilities and training; and because Kentucky has no reliable means of monitoring the anesthetic depth of the prisoner after the sodium thiopental has been administered. Brief for Petitioners 12–20.

As for the risk that the sodium thiopental would be improperly prepared, petitioners contend that Kentucky employs untrained personnel who are unqualified to calculate and mix an adequate dose, especially in light of the omission of volume and concentration amounts from the written protocol. *Id.*, at 45–46. The state trial court, however, specifically found that "[i]f the manufacturers' instructions for reconstitution of Sodium Thiopental are followed, . . . there would be minimal risk of improper mixing, despite converse testimony that a layperson would have difficulty performing this task." App. 761. We cannot say that this finding is clearly erroneous, see *Hernandez* v. *New York*, 500 U. S. 352, 366 (1991) (plurality opinion), particularly when that finding is substantiated by expert testimony describing the task of reconstituting powder sodium thiopental into solution form as "[n]ot difficult at all. . . . You take a liquid, you inject it into a vial with the powder, then you shake it up until the powder dissolves and, you're done. The instructions are on the package insert." 5 Tr. 695 (Apr. 19, 2005).

Likewise, the asserted problems related to the IV lines do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment. Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner. The most significant of these is the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. App. 984. Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population. *Id.*, at 273–274; Tr. of Oral Arg. 27–28. Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. App. 984. These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers. *Ibid.* In addition, the protocol calls for the IV team to establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences. *Id.*, at 975. These redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected. *Id.*, at 279–280, 337–338, 978–979.

The IV team has one hour to establish both the primary and backup IVs, a length of time the trial court found to be "not excessive but rather necessary," *id.*, at 762, contrary to petitioners' claim that using an IV inserted after any "more than ten or fifteen minutes of unsuccessful attempts is dangerous because the IV is almost certain to be unreliable," Brief for Petitioners 47. And, in any event, merely because the protocol gives the IV team one hour to establish intravenous access does not mean that team members are required to spend the entire hour in a futile attempt to do so. The

qualifications of the IV team also substantially reduce the risk of IV infiltration.

In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration. Three of the Commonwealth's medical experts testified that identifying signs of infiltration would be "very obvious," even to the average person, because of the swelling that would result. App. 385–386. See *id.*, at 353, 600–601. Kentucky's protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds. *Id.*, at 978–979. In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.

B

Nor does Kentucky's failure to adopt petitioners' proposed alternatives demonstrate that the Commonwealth's execution procedure is cruel and unusual.

First, petitioners contend that Kentucky could switch from a three-drug protocol to a one-drug protocol by using a single dose of sodium thiopental or other barbiturate. Brief for Petitioners 51–57. That alternative was not proposed to the state courts below.[4] As a result, we are left without any findings on the effectiveness of petitioners' barbiturate-only

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[4] Petitioners did allude to an "alternative chemical or combination of chemicals" that could replace Kentucky's three-drug protocol in their post-trial brief, see App. 684, but based on the arguments presented there, it is clear they intended to refer only to other, allegedly less painful drugs that could substitute for potassium chloride as a heart-stopping agent, see *id.*, at 701. Likewise, the only alternatives to the three-drug protocol presented to the Kentucky Supreme Court were those that replaced potassium chloride with other drugs for inducing cardiac arrest, or that omitted pancuronium bromide, or that added an analgesic to relieve pain. See Brief for Appellants in No. 2005–SC–00543, pp. 38, 39, 40.

protocol, despite scattered references in the trial testimony to the sole use of sodium thiopental or pentobarbital as a preferred method of execution. See Reply Brief for Petitioners 18, n. 6.

In any event, the Commonwealth's continued use of the three-drug protocol cannot be viewed as posing an "objectively intolerable risk" when no other State has adopted the one-drug method and petitioners proffered no study showing that it is an equally effective manner of imposing a death sentence. See App. 760–761, n. 8 ("Plaintiffs have not presented any scientific study indicating a better method of execution by lethal injection"). Indeed, the State of Tennessee, after reviewing its execution procedures, rejected a proposal to adopt a one-drug protocol using sodium thiopental. The State concluded that the one-drug alternative would take longer than the three-drug method and that the "required dosage of sodium thiopental would be less predictable and more variable when it is used as the sole mechanism for producing death . . . ." *Workman*, 486 F. 3d, at 919 (Appendix A, ¶(A)(3)). We need not endorse the accuracy of those conclusions to note simply that the comparative efficacy of a one-drug method of execution is not so well established that Kentucky's failure to adopt it constitutes a violation of the Eighth Amendment.

Petitioners also contend that Kentucky should omit the second drug, pancuronium bromide, because it serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of the first drug. The state trial court, however, specifically found that pancuronium serves two purposes. First, it prevents involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride. App. 763. The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress. Second, pancuronium stops respiration, hastening death.

Ibid. Kentucky's decision to include the drug does not offend the Eighth Amendment.[5]

Petitioners' barbiturate-only protocol, they contend, is not untested; it is used routinely by veterinarians in putting animals to sleep. Moreover, 23 States, including Kentucky, bar veterinarians from using a neuromuscular paralytic agent like pancuronium bromide, either expressly or, like Kentucky, by specifically directing the use of a drug like sodium pentobarbital. See Brief for Dr. Kevin Concannon et al. as *Amici Curiae* 18, n. 5. If pancuronium is too cruel for animals, the argument goes, then it must be too cruel for the condemned inmate. Whatever rhetorical force the argument carries, see *Workman*, *supra*, at 909 (describing the comparison to animal euthanasia as "more of a debater's point"), it overlooks the States' legitimate interest in providing for a quick, certain death. In the Netherlands, for example, where physician-assisted euthanasia is permitted, the Royal Dutch Society for the Advancement of Pharmacy recommends the use of a muscle relaxant (such as pancuronium dibromide) in addition to thiopental in order to prevent a prolonged, undignified death. See Kimsma, Euthanasia and Euthanizing Drugs in The Netherlands, reprinted in Drug Use in Assisted Suicide and Euthanasia 193, 200, 204 (M. Battin & A. Lipman eds. 1996). That concern may be less compelling in the veterinary context, and in any event other methods approved by veterinarians—such as stunning the animal or severing its spinal cord, see 6 Tr. 758–759 (Apr. 20, 2005)—make clear that veterinary practice for animals is not an appropriate guide to humane practices for humans.

Petitioners also fault the Kentucky protocol for lacking a systematic mechanism for monitoring the "anesthetic depth"

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[5] JUSTICE STEVENS's conclusion that the risk addressed by pancuronium bromide is "vastly outweighed" by the risk of pain at issue here, see *post*, at 73 (opinion concurring in judgment), depends, of course, on the magnitude of the risk of such pain. As explained, that risk is insignificant in light of the safeguards Kentucky has adopted.

of the prisoner. Under petitioners' scheme, qualified personnel would employ monitoring equipment, such as a Bispectral Index (BIS) monitor, blood pressure cuff, or EKG to verify that a prisoner has achieved sufficient unconsciousness before injecting the final two drugs. The visual inspection performed by the warden and deputy warden, they maintain, is an inadequate substitute for the more sophisticated procedures they envision. Brief for Petitioners 19, 58.

At the outset, it is important to reemphasize that a proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated. All the experts who testified at trial agreed on this point. The risks of failing to adopt additional monitoring procedures are thus even more "remote" and attenuated than the risks posed by the alleged inadequacies of Kentucky's procedures designed to ensure the delivery of thiopental. See *Hamilton* v. *Jones*, 472 F. 3d 814, 817 (CA10 2007) (*per curiam*); *Taylor* v. *Crawford*, 487 F. 3d 1072, 1084 (CA8 2007).

But more than this, Kentucky's expert testified that a blood pressure cuff would have no utility in assessing the level of the prisoner's unconsciousness following the introduction of sodium thiopental, which depresses circulation. App. 578. Furthermore, the medical community has yet to endorse the use of a BIS monitor, which measures brain function, as an indication of anesthetic awareness. American Society of Anesthesiologists, Practice Advisory for Intraoperative Awareness and Brain Function Monitoring, 104 Anesthesiology 847, 855 (Apr. 2006); see *Brown* v. *Beck*, 445 F. 3d 752, 754–755 (CA4 2006) (Michael, J., dissenting). The asserted need for a professional anesthesiologist to interpret the BIS monitor readings is nothing more than an argument against the entire procedure, given that both Kentucky law, see Ky. Rev. Stat. Ann. §431.220(3), and the American Society of Anesthesiologists' own ethical guidelines, see Brief for American Society of Anesthesiologists as *Amicus Curiae* 2–3, prohibit anesthesiologists from participating in capi-

tal punishment. Nor is it pertinent that the use of a blood pressure cuff and EKG is "the standard of care in surgery requiring anesthesia," as the dissent points out. *Post*, at 119. Petitioners have not shown that these supplementary procedures, drawn from a different context, are necessary to avoid a substantial risk of suffering.

The dissent believes that rough-and-ready tests for checking consciousness—calling the inmate's name, brushing his eyelashes, or presenting him with strong, noxious odors—could materially decrease the risk of administering the second and third drugs before the sodium thiopental has taken effect. See *post*, at 118. Again, the risk at issue is already attenuated, given the steps Kentucky has taken to ensure the proper administration of the first drug. Moreover, the scenario the dissent posits involves a level of unconsciousness allegedly sufficient to avoid detection of improper administration of the anesthesia under Kentucky's procedure, but not sufficient to prevent pain. See *post*, at 121–122. There is no indication that the basic tests the dissent advocates can make such fine distinctions. If these tests are effective only in determining whether the sodium thiopental has entered the inmate's bloodstream, see *post*, at 118–119, the record confirms that the visual inspection of the IV site under Kentucky's procedure achieves that objective. See *supra*, at 56.[6]

The dissent would continue the stay of these executions (and presumably the many others held in abeyance pending decision in this case) and send the case back to the lower courts to determine whether such added measures redress an "untoward" risk of pain. *Post*, at 123. But an inmate

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[6]Resisting this point, the dissent rejects the expert testimony that problems with the IV administration of sodium thiopental would be obvious, see *post*, at 122, testimony based not only on the pain that would result from injecting the first drug into tissue rather than the vein, see App. 600–601, but also on the swelling that would occur, see *id.*, at 353. See also *id.*, at 385–386. Neither of these expert conclusions was disputed below.

cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner. See *Baze* v. *Parker*, 371 F. 3d 310, 317 (CA6 2004) (petitioner Baze sentenced to death in 1994); *Bowling* v. *Parker*, 138 F. Supp. 2d 821, 840 (ED Ky. 2001) (petitioner Bowling sentenced to death in 1991).

JUSTICE STEVENS suggests that our opinion leaves the disposition of other cases uncertain, see *post*, at 71, but the standard we set forth here resolves more challenges than he acknowledges. A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

* * *

Reasonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable. But as Justice Frankfurter stressed in *Resweber*, "[o]ne must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation." 329 U. S., at 471 (concurring opinion). This Court has ruled that capital punishment is not prohibited under our Constitution, and that the States may enact laws specifying that sanction. "[T]he power of a State to pass laws means little if the State cannot enforce them." *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991). State efforts to implement capital punishment must certainly comply with the Eighth Amendment, but what that Amendment prohibits is wanton exposure to "objectively intolerable

risk," *Farmer*, 511 U. S., at 846, and n. 9, not simply the possibility of pain.

Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. The risks of maladministration they have suggested—such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel—cannot remotely be characterized as "objectively intolerable." Kentucky's decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment. Finally, the alternative that petitioners belatedly propose has problems of its own, and has never been tried by a single State.

Throughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge. Our society has nonetheless steadily moved to more humane methods of carrying out capital punishment. The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection. *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 657 (1992) (STEVENS, J., dissenting); App. 755. The broad framework of the Eighth Amendment has accommodated this progress toward more humane methods of execution, and our approval of a particular method in the past has not precluded legislatures from taking the steps they deem appropriate, in light of new developments, to ensure humane capital punishment. There is no reason to suppose that today's decision will be any different.[7]

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[7] We do not agree with JUSTICE STEVENS that anything in our opinion undermines or remotely addresses the validity of capital punishment. See *post*, at 80–81. The fact that society has moved to progressively more

The judgment below concluding that Kentucky's procedure is consistent with the Eighth Amendment is, accordingly, affirmed.

It is so ordered.

JUSTICE ALITO, concurring.

I join the plurality opinion but write separately to explain my view of how the holding should be implemented. The opinion concludes that "a State's refusal to change its method [of execution] can be viewed as 'cruel and unusual' under the Eighth Amendment" if the State, "without a legitimate penological justification," rejects an alternative method that is "feasible" and "readily" available and that would "significantly reduce a substantial risk of severe pain." *Ante*, at 52. Properly understood, this standard will not, as JUSTICE THOMAS predicts, lead to litigation that enables "those seeking to abolish the death penalty . . . to embroil the States in never-ending litigation concerning the adequacy of their execution procedures." *Post*, at 105 (opinion concurring in judgment).

I

As the plurality opinion notes, the constitutionality of capital punishment is not before us in this case, and therefore we proceed on the assumption that the death penalty is constitutional. *Ante*, at 47. From that assumption, it follows that there must be a constitutional means of carrying out a death sentence.

We also proceed in this case on the assumption that lethal injection is a constitutional means of execution. See *Gregg* v. *Georgia*, 428 U. S. 153, 175 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[I]n assessing a punishment selected by a democratically elected legislature against the

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humane methods of execution does not suggest that capital punishment itself no longer serves valid purposes; we would not have supposed that the case for capital punishment was stronger when it was imposed predominantly by hanging or electrocution.

constitutional measure, we presume its validity"). Lethal injection was adopted by the Federal Government and 36 States because it was thought to be the most humane method of execution, and petitioners here do not contend that lethal injection should be abandoned in favor of any of the methods that it replaced—execution by electric chair, the gas chamber, hanging, or a firing squad. Since we assume for present purposes that lethal injection is constitutional, the use of that method by the Federal Government and the States must not be blocked by procedural requirements that cannot practicably be satisfied.

Prominent among the practical constraints that must be taken into account in considering the feasibility and availability of any suggested modification of a lethal injection protocol are the ethical restrictions applicable to medical professionals. The first step in the lethal injection protocols currently in use is the anesthetization of the prisoner. If this step is carried out properly, it is agreed, the prisoner will not experience pain during the remainder of the procedure. Every day, general anesthetics are administered to surgical patients in this country, and if the medical professionals who participate in these surgeries also participated in the anesthetization of prisoners facing execution by lethal injection, the risk of pain would be minimized. But the ethics rules of medical professionals—for reasons that I certainly do not question here—prohibit their participation in executions.

Guidelines issued by the American Medical Association (AMA) state that "[a]n individual's opinion on capital punishment is the personal moral decision of the individual," but that "[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution." AMA, Code of Medical Ethics, Policy E–2.06 Capital Punishment (2000), online at http://www.ama-assn.org/ama1/pub/upload/mm/369/e206capitalpunish.pdf (all Internet materials as vis-

ited Apr. 14, 2008, and available in Clerk of Court's case file). The guidelines explain:

> "Physician participation in an execution includes, but is not limited to, the following actions: prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution." *Ibid.*

The head of ethics at the AMA has reportedly opined that "[e]ven helping to design a more humane protocol would disregard the AMA code." Marris, Will Medics' Qualms Kill the Death Penalty? 441 Nature 8–9 (May 4, 2006).

The American Nurses Association (ANA) takes the position that participation in an execution "is a breach of the ethical traditions of nursing, and the *Code for Nurses*." ANA, Position Statement: Nurses' Participation in Capital Punishment (1994), online at http://nursingworld.org/Mainmenu Categories / Health care and Policy Issues / ANA Position Statements / EthicsandHumanRights.aspx. This means, the ANA explains, that a nurse must not "take part in assessment, supervision or monitoring of the procedure or the prisoner; procuring, prescribing or preparing medications or solutions; inserting the intravenous catheter; injecting the lethal solution; and attending or witnessing the execution as a nurse." *Ibid.*

The National Association of Emergency Medical Technicians (NAEMT) holds that "[p]articipation in capital punishment is inconsistent with the ethical precepts and goals of the [Emergency Medical Services] profession." NAEMT, Position Statement on EMT and Paramedic Participation in Capital Punishment (June 9, 2006), online at http://www.naemt.org/aboutNAEMT/capitalpunishment.htm. The NAEMT's Position Statement advises that emergency medi-

cal technicians and paramedics should refrain from the same activities outlined in the ANA statement. *Ibid.*

Recent litigation in California has demonstrated the effect of such ethics rules. Michael Morales, who was convicted and sentenced to death for a 1981 murder, filed a federal civil rights action challenging California's lethal injection protocol, which, like Kentucky's, calls for the sequential administration of three drugs: sodium pentothal, pancuronium bromide, and potassium chloride. The District Court enjoined the State from proceeding with the execution unless it either (1) used only sodium pentothal or another barbiturate or (2) ensured that an anesthesiologist was present to ensure that Morales remained unconscious throughout the process. *Morales* v. *Hickman*, 415 F. Supp. 2d 1037, 1047 (ND Cal. 2006). The Ninth Circuit affirmed the District Court's order, *Morales* v. *Hickman*, 438 F. 3d 926, 931 (2006), and the State arranged for two anesthesiologists to be present for the execution. However, they subsequently concluded that "they could not proceed for reasons of medical ethics," *Morales* v. *Tilton*, 465 F. Supp. 2d 972, 976 (ND Cal. 2006), and neither Morales nor any other prisoner in California has since been executed, see Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Ford. L. Rev. 49 (2007).

Objections to features of a lethal injection protocol must be considered against the backdrop of the ethics rules of medical professionals and related practical constraints. Assuming, as previously discussed, that lethal injection is not unconstitutional *per se*, it follows that a suggested modification of a lethal injection protocol cannot be regarded as "feasible" or "readily" available if the modification would require participation—either in carrying out the execution or in training those who carry out the execution—by persons whose professional ethics rules or traditions impede their participation.

II

In order to show that a modification of a lethal injection protocol is required by the Eighth Amendment, a prisoner must demonstrate that the modification would "*significantly* reduce a *substantial* risk of *severe* pain." *Ante*, at 52 (emphasis added). Showing merely that a modification would result in some reduction in risk is insufficient. Moreover, an inmate should be required to do more than simply offer the testimony of a few experts or a few studies. Instead, an inmate challenging a method of execution should point to a well-established scientific consensus. Only if a State refused to change its method in the face of such evidence would the State's conduct be comparable to circumstances that the Court has previously held to be in violation of the Eighth Amendment. See *Farmer* v. *Brennan*, 511 U. S. 825, 836 (1994).

The present case well illustrates the need for this type of evidence. Although there has been a proliferation of litigation challenging current lethal injection protocols, evidence regarding alleged defects in these protocols and the supposed advantages of alternatives is strikingly haphazard and unreliable. As THE CHIEF JUSTICE and JUSTICE BREYER both note, the much-discussed Lancet article, Koniaris, Zimmers, Lubarsky, & Sheldon, Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (Apr. 2005), that prompted criticism of the three-drug protocol has now been questioned, see Groner, Inadequate Anaesthesia in Lethal Injection for Execution, 366 Lancet 1073 (Sept. 2005). And the lack of clear guidance in the currently available scientific literature is dramatically illustrated by the conclusions reached by petitioners and by JUSTICE STEVENS regarding what they view as superior alternatives to the three-drug protocol.

Petitioners' chief argument is that Kentucky's procedure violates the Eighth Amendment because it does not employ

a one-drug protocol involving a lethal dose of an anesthetic. By "relying . . . on a lethal dose of an anesthetic," petitioners contend, Kentucky "would virtually eliminate the risk of pain." Brief for Petitioners 51. Petitioners point to expert testimony in the trial court that "a three-gram dose of thiopental would cause death within three minutes to fifteen minutes." *Id.*, at 54, n. 16.

The accuracy of that testimony is not universally accepted. Indeed, the medical authorities in the Netherlands, where assisted suicide is legal, have recommended against the use of a lethal dose of a barbiturate. An *amicus* supporting petitioners, Dr. Robert D. Truog, Professor of Medical Ethics and Anesthesiology at Harvard Medical School, has made the following comments about the use of a lethal dose of a barbiturate:

> "A number of experts have said that 2 or 3 or 5 g[rams] of pentothal is absolutely going to be lethal. The fact is that, at least in this country, none of us have any experience with this. . . .
>
> "If we go to Holland, where euthanasia is legal, and [we] look at a study from 2000 of 535 cases of euthanasia, in 69% of those cases, they used a paralytic agent. Now, what do they know that we haven't figured out yet? I think what they know is that it's actually very difficult to kill someone with just a big dose of a barbiturate. And, in fact, they report that in 6% of those cases, there were problems with completion. And in I think five of those, the person actually woke up, came back out of coma." Perspective Roundtable: Physicians and Execution—Highlights from a Discussion of Lethal Injection, 358 New England J. Med. 448 (2008).

JUSTICE STEVENS does not advocate a one-drug protocol but argues that "States wishing to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of

pancuronium bromide" in the second step of the three-drug protocol.* *Post*, at 77 (opinion concurring in judgment). But this very drug, pancuronium bromide, is recommended by the Royal Dutch Society for the Advancement of Pharmacy as the second of the two drugs to be used in cases of euthanasia. See Kimsma, Euthanasia and Euthanizing Drugs in The Netherlands, reprinted in Drug Use in Assisted Suicide and Euthanasia 193, 200, 204 (M. Battin & A. Lipman eds. 1996).

My point in citing the Dutch study is not that a multidrug protocol is in fact better than a one-drug protocol or that it is advisable to use pancuronium bromide. Rather, my point is that public policy on the death penalty, an issue that stirs deep emotions, cannot be dictated by the testimony of an expert or two or by judicial findings of fact based on such testimony.

III

The seemingly endless proceedings that have characterized capital litigation during the years following *Gregg* are well documented. In 1989, the Report of the Judicial Conference's Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, chaired by Justice Powell, noted the lengthy delays produced by collateral litigation in death penalty cases. See Committee Report and Proposal 2–4. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was designed to address this problem. See, *e. g.*, *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of

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*In making this recommendation, he states that "[t]here is a general understanding among veterinarians that the risk of pain is sufficiently serious that the use of [this] drug should be proscribed when an animal's life is being terminated." *Post*, at 71. But the American Veterinary Medical Association (AVMA) guidelines take pains to point out that they should not be interpreted as commenting on the execution of humans by lethal injection. AVMA, Guidelines on Euthanasia (June 2007), online at http://avma.org/issues/animal_welfare/euthanasia.pdf.

state and federal criminal sentences, particularly in capital cases . . . " (citing *Williams* v. *Taylor*, 529 U. S. 362, 386 (2000) (opinion of STEVENS, J.))); H. R. Rep. No. 104–23, p. 8 (1995) (stating that AEDPA was "designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases").

Misinterpretation of the standard set out in the plurality opinion or adoption of the standard favored by the dissent and JUSTICE BREYER would create a grave danger of extended delay. The dissenters and JUSTICE BREYER would hold that the protocol used in carrying out an execution by lethal injection violates the Eighth Amendment if it creates an "*untoward*, readily avoidable risk of inflicting severe and unnecessary pain." See *post*, at 123 (GINSBURG, J., dissenting) (emphasis added); *post*, at 107 (BREYER, J., concurring in judgment). Determining whether a risk is "untoward," we are told, requires a weighing of three factors—the severity of the pain that may occur, the likelihood of this pain, and the availability of alternative methods. *Post*, at 116 (GINSBURG, J., dissenting). We are further informed that "[t]he three factors are interrelated; a strong showing on one reduces the importance of the others." *Ibid.*

An "untoward" risk is presumably a risk that is "unfortunate" or "marked by or causing trouble or unhappiness." Webster's Third New International Dictionary 2513 (1971); Random House Dictionary of the English Language 1567 (1967). This vague and malleable standard would open the gates for a flood of litigation that would go a long way toward bringing about the end of the death penalty as a practical matter. While I certainly do not suggest that this is the intent of the Justices who favor this test, the likely consequences are predictable.

The issue presented in this case—the constitutionality of a *method* of execution—should be kept separate from the controversial issue of the death penalty itself. If the Court wishes to reexamine the latter issue, it should do so directly,

as JUSTICE STEVENS now suggests. *Post*, at 81. The Court should not produce a *de facto* ban on capital punishment by adopting method-of-execution rules that lead to litigation gridlock.

JUSTICE STEVENS, concurring in the judgment.

When we granted certiorari in this case, I assumed that our decision would bring the debate about lethal injection as a method of execution to a close. It now seems clear that it will not. The question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record. Instead of ending the controversy, I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of the paralytic agent, pancuronium bromide, but also about the justification for the death penalty itself.

I

Because it masks any outward sign of distress, pancuronium bromide creates a risk that the inmate will suffer excruciating pain before death occurs. There is a general understanding among veterinarians that the risk of pain is sufficiently serious that the use of the drug should be proscribed when an animal's life is being terminated.[1] As a

[1] The 2000 Report of the American Veterinary Medical Association (AVMA) Panel on Euthanasia stated that a "combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent." 218 J. Am. Veterinary Med. Assn. 669, 680 (2001). In a 2006 supplemental statement, however, the AVMA clarified that this statement was intended as a recommendation against mixing a barbiturate and neuromuscular blocking agent in the same syringe, since such practice creates the possibility that the paralytic will take effect before the barbiturate, rendering the animal paralyzed while still conscious. The 2007 AVMA Guidelines on Euthanasia plainly state that the application of a barbiturate, paralyzing agent, and potassium chloride delivered in separate sy-

result of this understanding among knowledgeable professionals, several States—including Kentucky—have enacted legislation prohibiting use of the drug in animal euthanasia. See 2 Ky. Admin. Regs., tit. 201, ch. 16:090, § 5(1) (2004).[2] It is unseemly—to say the least—that Kentucky may well kill

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ringes or stages is not discussed in the report. Several veterinarians, however, have filed an *amici* brief in this case arguing that the three-drug cocktail fails to measure up to veterinary standards and that the use of pancuronium bromide should be prohibited. See Brief for Dr. Kevin Concannon et al. as *Amici Curiae* 16–18. The Humane Society has also declared "inhumane" the use of "any combination of sodium pentobarbital with a neuromuscular blocking agent." R. Rhoades, The Humane Society of the United States, Euthanasia Training Manual 133 (2002); see also Alper, Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia, 35 Ford. Urb. L. J. 817, 840 (2008) (concluding, based on a comprehensive study of animal euthanasia laws and regulations, that "the field of animal euthanasia has reached a unanimous consensus that neuromuscular blocking agents like pancuronium have no legitimate place in the execution process"), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1109258 (all Internet materials as visited Apr. 10, 2008, and available in Clerk of Court's case file).

[2] See also, *e. g.*, Fla. Stat. § 828.058(3) (2006) ("[A]ny substance which acts as a neuromuscular blocking agent . . . may not be used on a dog or cat for any purpose"); N. J. Stat. Ann. § 4:22–19.3 (West 1998) ("Whenever any dog, cat, or any other domestic animal is to be destroyed, the use of succinylcholine chloride, curare, curariform drugs, or any other substance which acts as a neuromuscular blocking agent is prohibited"); N. Y. Agric. & Mkts. Law Ann. § 374(2–b) (West 2004) ("No person shall euthanize any dog or cat with T–61, curare, any curariform drug, any neuromuscular blocking agent or any other paralyzing drug"); Tenn. Code Ann. § 44–17–303(c) (2007) ("Succinylcholine chloride, curare, curariform mixtures . . . or any substance that acts as a neuromuscular blocking agent . . . may not be used on any non-livestock animal for the purpose of euthanasia"). According to a recent study, not a single State sanctions the use of a paralytic agent in the administration of animal euthanasia, 9 States explicitly ban the use of such drugs, 13 others ban it by implication—*i. e.*, by mandating the use of nonparalytic drugs, 12 arguably ban it by reference to the AVMA guidelines, and 8 others express a strong preference for use of nonparalytic drugs. Alper, *supra*, at 841–842, and App. I to Alper, *supra*, at 853.

petitioners using a drug that it would not permit to be used on their pets.

Use of pancuronium bromide is particularly disturbing because—as the trial court specifically found in this case—it serves "no therapeutic purpose." App. 763. The drug's primary use is to prevent involuntary muscle movements, and its secondary use is to stop respiration. In my view, neither of these purposes is sufficient to justify the risk inherent in the use of the drug.

The plurality believes that preventing involuntary movement is a legitimate justification for using pancuronium bromide because "[t]he Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress." *Ante*, at 57. This is a woefully inadequate justification. Whatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable by an incorrect belief (which could easily be corrected) that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect.[3] Nor is there any necessity for pancuronium bromide to be included in the cocktail to inhibit respiration when it is immediately followed by potassium chloride, which causes death quickly by stopping the inmate's heart.

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[3] Indeed, the decision by prison administrators to use the drug on humans for esthetic reasons is not supported by any consensus of medical professionals. To the contrary, the medical community has considered—and rejected—this esthetic rationale for administering neuromuscular blocking agents in end-of-life care for terminally ill patients whose families may be disturbed by involuntary movements that are misperceived as signs of pain or discomfort. As explained in an *amici curiae* brief submitted by critical care providers and clinical ethicists, the medical and medical ethics communities have rejected this rationale because there is a danger that such drugs will mask signs that the patient is actually in pain. See Brief for Critical Care Providers et al. as *Amici Curiae*.

Moreover, there is no nationwide endorsement of the use of pancuronium bromide that merits any special presumption of respect. While state legislatures have approved lethal injection as a humane method of execution, the majority have not enacted legislation specifically approving the use of pancuronium bromide, or any given combination of drugs.[4] And when the Colorado Legislature focused on the issue, it specified a one-drug protocol consisting solely of sodium thiopental. See Colo. Rev. Stat. Ann. § 18–1.3–1202 (2007).[5] In the majority of States that use the three-drug protocol, the drugs were selected by unelected department of correction

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[4]Of the 35 state statutes providing for execution by lethal injection, only approximately one-third specifically approve the use of a chemical paralytic agent. See Ark. Code Ann. § 5–4–617 (2006); Idaho Code § 19–2716 (Lexis 2004); Ill. Comp. Stat., ch. 725, § 5/119–5 (West 2006); Md. Crim. Law Code Ann. § 2–303 (Lexis Supp. 2007); Miss. Code Ann. § 99–19–51 (2007); Mont. Code Ann. § 46–19–103 (2007); N. H. Rev. Stat. Ann. § 630:5 (2007); N. M. Stat. Ann. § 31–14–11 (2000); N. C. Gen. Stat. Ann. § 15–187 (Lexis 2007); Okla. Stat., Tit. 22, § 1014 (West 2001); Ore. Rev. Stat. § 137.473 (2003); Pa. Stat. Ann., Tit. 61, § 3004 (Purdon 1999); Wyo. Stat. Ann. § 7–13–904 (2007). Twenty of the remaining States do not specify any particular drugs. See Ariz. Rev. Stat. Ann. § 13–704 (West 2001); Cal. Penal Code Ann. § 3604 (West 2000); Conn. Gen. Stat. § 54–100 (2007); Del. Code Ann., Tit. 11, § 4209 (2006 Supp.); Fla. Stat. § 922.105 (2006); Ga. Code Ann. § 17–10–38 (2004); Ind. Code § 35–38–6–1 (West 2004); Kan. Stat. Ann. § 22–4001 (2006 Cum. Supp.); Ky. Rev. Stat. Ann. § 431.220 (West 2006); La. Stat. Ann. § 15:569 (West 2005); Mo. Rev. Stat. § 546.720 (2007 Cum. Supp.); Nev. Rev. Stat. § 176.355 (2007); Ohio Rev. Code Ann. § 2949.22 (Lexis 2006); S. C. Code Ann. § 24–3–530 (2007); S. D. Codified Laws § 23A–27A–32 (Supp. 2007); Tenn. Code Ann. § 40–23–114 (2006); Tex. Code Crim. Proc. Ann., Art. 43.14 (Vernon 2006 Supp. Pamphlet); Utah Code Ann. § 77–18–5.5 (Lexis Supp. 2007); Va. Code Ann. § 53.1–234 (Lexis Supp. 2007); Wash. Rev. Code § 10.95.180 (2006).

[5]Colorado's statute provides for "a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death." § 18–1.3–1202. Despite the fact that the statute specifies only sodium thiopental, it appears that Colorado uses the same three drugs as other States. See Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Ford. L. Rev. 49, 97, and n. 322 (2007).

officials with no specialized medical knowledge and without the benefit of expert assistance or guidance. As such, their drug selections are not entitled to the kind of deference afforded legislative decisions.

Nor should the failure of other state legislatures, or of Congress, to outlaw the use of the drug on condemned prisoners be viewed as a nationwide endorsement of an unnecessarily dangerous practice. Even in those States where the legislature specifically approved the use of a paralytic agent, review of the decisions that led to the adoption of the three-drug protocol has persuaded me that they are the product of "'administrative convenience'" and a "stereotyped reaction" to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion. See *Mathews* v. *Lucas*, 427 U. S. 495, 519, 520–521 (1976) (STEVENS, J., dissenting). Indeed, the trial court found that "the various States simply fell in line" behind Oklahoma, adopting the protocol without any critical analysis of whether it was the best available alternative.[6] App. 756; see also *post*, at 117 (GINSBURG, J., dissenting).

New Jersey's experience with the creation of a lethal injection protocol is illustrative. When New Jersey restored the death penalty in 1983, its legislature "fell in line" and enacted a statute that called for inmates to be executed by "continuous, intravenous administration until the person is dead of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent in a quantity sufficient to cause death." N. J. Stat. Ann. §2C:49–2 (West 2005). New Jersey Department of Corrections (DOC) officials, including doctors and administrators, immediately expressed

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[6] Notably, the Oklahoma medical examiner who devised the protocol has disavowed the use of pancuronium bromide. When asked in a recent interview why he included it in his formula, he responded: "'It's a good question. If I were doing it now, I would probably eliminate it.'" E. Cohen, Lethal injection creator: Maybe it's time to change formula, online at http://www.cnn.com/2007/HEALTH/04/30/lethal.injection/index.html.

concern. The capital sentencing unit's chief doctor, for example, warned the assistant commissioner that he had "'concerns . . . in regard to the chemical substance classes from which the lethal substances may be selected.'" Edwards, New Jersey's Long Waltz With Death, 170 N. J. L. J. 657, 673 (2002).[7] Based on these concerns, the former DOC commissioner lobbied the legislature to amend the lethal injection statute to provide DOC with discretion to select more humane drugs: "'[We wanted] a generic statement, like "drugs to be determined and identified by the commissioner, or the attorney general, or the Department of Health"' . . . . 'Who knew what the future was going to bring?'" *Ibid.* And these concerns likely motivated the DOC's decision to adopt a protocol that omitted pancuronium bromide—despite the legislature's failure to act on the proposed amendment. See Denno, When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us, 63 Ohio St. L. J. 63, 117–118, 233 (2002) (explaining that the New Jersey protocol in effect in 2002 called for use of a two-drug cocktail consisting of sodium thiopental and potassium chloride).

Indeed, DOC officials seemed to harbor the same concerns when they undertook to revise New Jersey's lethal injection protocol in 2005. At a public hearing on the proposed amendment, the DOC supervisor of legal and legislative affairs told attendees that the drugs to be used in the lethal injection protocol were undetermined:

> "Those substances have not been determined at this point because when and if an execution is scheduled the

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[7] Officials of the DOC had before them an advisory paper submitted by a group of New York doctors recommending sodium thiopental "'without the addition of other drugs,'" and the supervisor of the health services unit was informed in a memo from a colleague that pancuronium bromide "'will cause paralysis of the vocal chords and stop breathing, and hence could cause death by asphyxiation.'" Edwards, 170 N. J. L. J., at 673.

> [DOC] will be doing research and determining the state-of-the-art drugs at that point in time . . . . We have not made a decision on which specific drugs because we will have several months once we know that somebody is going to be executed and it will give us the opportunity at that point to decide which would be the most humane.
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> "And things change. We understand that the state-of-the-art is changing daily so to say we are going to use something today when something may be more humane becomes known later wouldn't make sense for us." Tr. of Public Hearing on Proposed Amendments to the New Jersey Lethal Injection Protocol 36 (Feb. 4, 2005).

It is striking that when this state agency—with some specialized medical knowledge and with the benefit of some expert assistance and guidance—focused on the issue, it disagreed with the legislature's "stereotyped reaction," *Mathews*, 427 U. S., at 520, 521 (STEVENS, J., dissenting), and specified a two-drug protocol that omitted pancuronium bromide.[8]

In my view, therefore, States wishing to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide.[9]

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[8] Further, concerns about this issue may have played a role in New Jersey's subsequent decisions to create a New Jersey Death Penalty Study Commission in 2006, and ultimately to abolish the death penalty in 2007.

[9] For similar reasons, States may also be well advised to reconsider the sufficiency of their procedures for checking the inmate's consciousness. See *post*, at 118–123 (GINSBURG, J., dissenting).

JUSTICE ALITO correctly points out that the Royal Dutch Society for the Advancement of Pharmacy recommends pancuronium bromide "as the second of the two drugs to be used in cases of euthanasia." *Ante*, at 69 (concurring opinion). In the Netherlands, however, physicians with training in anesthesiology are involved in assisted suicide. For reasons

II

The thoughtful opinions written by THE CHIEF JUSTICE and by JUSTICE GINSBURG have persuaded me that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), we explained that unless a criminal sanction serves a legitimate penological function, it constitutes "gratuitous infliction of suffering" in violation of the Eighth Amendment. We then identified three societal purposes for death as a sanction: incapacitation, deterrence, and retribution. See *id.*, at 183, and n. 28 (joint opinion of Stewart, Powell, and STEVENS, JJ.). In the past three decades, however, each of these rationales has been called into question.

While incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.[10] Moreover, a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an

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JUSTICE ALITO details, see *ante*, at 64–66, physicians have no similar role in American executions. When trained medical personnel administer anesthesia and monitor the individual's anesthetic depth, the serious risks that concern me are not presented.

[10] Forty-eight States now have some form of life imprisonment without parole, with the majority of statutes enacted within the last two decades. See Note, A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment, 119 Harv. L. Rev. 1838, 1839, 1841–1844 (2006).

alternative option.[11] And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.[12]

The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders.[13] In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.

We are left, then, with retribution as the primary rationale for imposing the death penalty. And indeed, it is the retribution rationale that animates much of the remaining enthu-

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[11] See R. Dieter, Sentencing for Life: Americans Embrace Alternatives to the Death Penalty (Apr. 1993), online at http://www.deathpenaltyinfo.org/article.php?scid=45&did=481.

[12] In one study, potential capital jurors in Virginia stated that knowing about the existence of statutes providing for life without the possibility of parole would significantly influence their sentencing decision. In another study, a significant majority of potential capital jurors in Georgia said they would be more likely to select a life sentence over a death sentence if they knew that the defendant would be ineligible for parole for at least 25 years. See Note, 119 Harv. L. Rev., at 1845. Indeed, this insight drove our decision in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), that capital defendants have a due process right to require that their sentencing juries be informed of their ineligibility for parole.

[13] Admittedly, there has been a recent surge in scholarship asserting the deterrent effect of the death penalty, see, *e. g.*, Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. Law & Econ. 453 (2003); Adler & Summers, Capital Punishment Works, Wall Street Journal, Nov. 2, 2007, p. A13, but there has been an equal, if not greater, amount of scholarship criticizing the methodologies of those studies and questioning the results, see, *e. g.*, Fagan, Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment, 4 Ohio St. J. Crim. L. 255 (2006); Donohue & Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791 (2005).

siasm for the death penalty.[14] As Lord Justice Denning argued in 1950, "'some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.'" See *Gregg*, 428 U. S., at 184, n. 30. Our Eighth Amendment jurisprudence has narrowed the class of offenders eligible for the death penalty to include only those who have committed outrageous crimes defined by specific aggravating factors. It is the cruel treatment of victims that provides the most persuasive arguments for prosecutors seeking the death penalty. A natural response to such heinous crimes is a thirst for vengeance.[15]

At the same time, however, as the thoughtful opinions by THE CHIEF JUSTICE and JUSTICE GINSBURG make pellucidly clear, our society has moved away from public and painful retribution toward ever more humane forms of punishment. State-sanctioned killing is therefore becoming more and more anachronistic. In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is

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[14] Retribution is the most common basis of support for the death penalty. A recent study found that 37% of death penalty supporters cited "[a]n eye for an eye/they took a life/fits the crime" as their reason for supporting capital punishment. Another 13% cited "They deserve it." The next most common reasons—"[s]av[ing] taxpayers money/cost associated with prison" and deterrence—were each cited by 11% of supporters. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 147 (2003) (Table 2.55), online at http://www.albany.edu/sourcebook/pdf/t255.pdf.

[15] For example, family members of victims of the Oklahoma City bombing called for the Government to "'put [Timothy McVeigh] inside a bomb and blow it up.'" Walsh, One Arraigned, Two Undergo Questioning, Washington Post, Apr. 22, 1995, pp. A1, A13. Commentators at the time noted that an overwhelming percentage of Americans felt that executing McVeigh was not enough. Lindner, A Political Verdict: McVeigh: When Death Is Not Enough, L. A. Times, June 8, 1997, p. M1.

comparable to the suffering inflicted on his victim.[16] This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based. See, *e. g.*, Kaufman-Osborn, Regulating Death: Capital Punishment and the Late Liberal State, 111 Yale L. J. 681, 704 (2001) (explaining that there is "a tension between our desire to realize the claims of retribution by killing those who kill, and . . . a method [of execution] that, because it seems to do no harm other than killing, cannot satisfy the intuitive sense of equivalence that informs this conception of justice"); A. Sarat, When the State Kills: Capital Punishment and the American Condition 60–84 (2001).

Full recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this Court and legislatures to reexamine the question recently posed by Professor Salinas, a former Texas prosecutor and judge: "Is it time to Kill the Death Penalty?" See Salinas, 34 Am. J. Crim. L. 39 (2006). The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.[17]

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[16] For example, one survivor of the Oklahoma City bombing expressed a belief that "'death by [lethal] injection [was] "too good" for McVeigh.'" A. Sarat, When the State Kills: Capital Punishment and the American Condition 64 (2001). Similarly, one mother, when told that her child's killer would die by lethal injection, asked: "Do they feel anything? Do they hurt? Is there any pain? Very humane compared to what they've done to our children. The torture they've put our kids through. I think sometimes it's too easy. They ought to feel something. If it's fire burning all the way through their body or whatever. There ought to be some little sense of pain to it." *Id.*, at 60 (emphasis deleted).

[17] For a discussion of the financial costs as well as some of the less tangible costs of the death penalty, see Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1 (1995) (discussing, *inter alia*, the burden on the courts and the lack of finality for victim's families). Although a lack of finality in death cases may seem counterintuitive, Kozinski and Gallagher explain:

III

"[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." *Furman* v. *Georgia*, 408 U. S. 238, 331 (1972) (Marshall, J., concurring); see also *id.*, at 332 ("The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive' "). Our cases holding that certain sanctions are "excessive," and therefore prohibited by the Eighth Amendment, have relied

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"Death cases raise many more issues, and more complex issues, than other criminal cases, and they are attacked with more gusto and reviewed with more vigor in the courts. This means there is a strong possibility that the conviction or sentence will be reconsidered—seriously reconsidered—five, ten, twenty years after the trial. . . . One has to wonder and worry about the effect this has on the families of the victims, who have to live with the possibility—and often the reality—of retrials, evidentiary hearings, and last-minute stays of execution for decades after the crime." *Id.*, at 17–18 (footnotes omitted).

Thus, they conclude that "we are left in limbo, with machinery that is immensely expensive, that chokes our legal institutions so they are impeded from doing all the other things a society expects from its courts, [and] that visits repeated trauma on victims' families . . . ." *Id.*, at 27–28; see also Block, A Slow Death, N. Y. Times, Mar. 15, 2007, p. A27 (discussing the "enormous costs and burdens to the judicial system" resulting from the death penalty).

Some argue that these costs are the consequence of judicial insistence on unnecessarily elaborate and lengthy appellate procedures. To the contrary, they result "in large part from the States' failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing." *Knight* v. *Florida*, 528 U. S. 990, 998 (1999) (BREYER, J., dissenting from denial of certiorari). They may also result from a general reluctance by States to put large numbers of defendants to death, even after a sentence of death is imposed. Cf. Tempest, Death Row Often Means a Long Life; California Condemns Many Murderers, but Few Are Ever Executed, L. A. Times, Mar. 6, 2005, p. B1 (noting that California death row inmates account for about 20% of the Nation's total death row population, but that the State accounts for only 1% of the Nation's executions). In any event, they are most certainly not the fault of judges who do nothing more than ensure compliance with constitutional guarantees prior to imposing the irrevocable punishment of death.

heavily on "objective criteria," such as legislative enactments. See, *e. g.*, *Solem* v. *Helm*, 463 U. S. 277, 292 (1983); *Harmelin* v. *Michigan*, 501 U. S. 957 (1991); *United States* v. *Bajakajian*, 524 U. S. 321 (1998). In our recent decision in *Atkins* v. *Virginia*, 536 U. S. 304 (2002), holding that death is an excessive sanction for a mentally retarded defendant, we also relied heavily on opinions written by Justice White holding that the death penalty is an excessive punishment for the crime of raping a 16-year-old woman, *Coker* v. *Georgia*, 433 U. S. 584 (1977), and for a murderer who did not intend to kill, *Enmund* v. *Florida*, 458 U. S. 782 (1982). In those opinions we acknowledged that "objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Atkins*, 536 U. S., at 312 (quoting *Coker*, 433 U. S., at 597 (plurality opinion)).

Justice White was exercising his own judgment in 1972 when he provided the decisive vote in *Furman*, the case that led to a nationwide reexamination of the death penalty. His conclusion that death amounted to "cruel and unusual punishment in the constitutional sense" as well as the "dictionary sense," rested on both an uncontroversial legal premise and on a factual premise that he admittedly could not "prove" on the basis of objective criteria. 408 U. S., at 312, 313 (concurring opinion). As a matter of law, he correctly stated that the "needless extinction of life with only marginal contributions to any discernible social or public purposes . . . would be patently excessive" and violative of the Eighth Amendment. *Id.*, at 312. As a matter of fact, he stated, "like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty."

Id., at 313. I agree with Justice White that there are occasions when a Member of this Court has a duty to make judgments on the basis of data that falls short of absolute proof.

Our decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified by Justice Douglas' opinion in *Furman*, *id.*, at 240–257 (concurring opinion), of arbitrary application identified by Justice Stewart, *id.*, at 306 (same), and of excessiveness identified by Justices Brennan and Marshall. In subsequent years a number of our decisions relied on the premise that "death is different" from every other form of punishment to justify rules minimizing the risk of error in capital cases. See, *e. g.*, *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (plurality opinion). Ironically, however, more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.

Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a "death qualified jury" is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.[18]

Another serious concern is that the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the

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[18] See *Uttecht* v. *Brown*, 551 U. S. 1, 35 (2007) (STEVENS, J., dissenting) (explaining that "[m]illions of Americans oppose the death penalty," and that "[a] cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases").

crime does not go unpunished may overcome residual doubt concerning the identity of the offender. Our former emphasis on the importance of ensuring that decisions in death cases be adequately supported by reason rather than emotion, *Gardner*, 430 U. S. 349, has been undercut by more recent decisions placing a thumb on the prosecutor's side of the scales. Thus, in *Kansas* v. *Marsh*, 548 U. S. 163 (2006), the Court upheld a state statute that requires imposition of the death penalty when the jury finds that the aggravating and mitigating factors are in equipoise. And in *Payne* v. *Tennessee*, 501 U. S. 808 (1991), the Court overruled earlier cases and held that "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family is admissible despite the fact that it sheds no light on the question of guilt or innocence or on the moral culpability of the defendant, and thus serves no purpose other than to encourage jurors to make life or death decisions on the basis of emotion rather than reason.

A third significant concern is the risk of discriminatory application of the death penalty. While that risk has been dramatically reduced, the Court has allowed it to continue to play an unacceptable role in capital cases. Thus, in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), the Court upheld a death sentence despite the "strong probability that [the defendant's] sentencing jury . . . was influenced by the fact that [he was] black and his victim was white." *Id.*, at 366 (STEVENS, J., dissenting); see also *Evans* v. *State*, 396 Md. 256, 323, 914 A. 2d 25, 64 (2006), cert. denied, 552 U. S. 835 (2007) (affirming a death sentence despite the existence of a study showing that "the death penalty is *statistically* more likely to be pursued against a black person who murders a white victim than against a defendant in any other racial combination").

Finally, given the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive im-

portance to me. Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses. See Garrett, Judging Innocence, 108 Colum. L. Rev. 55 (2008); Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & C. 761 (2007). The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.

In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U. S., at 312 (White, J., concurring).[19]

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[19] Not a single Justice in *Furman* concluded that the mention of deprivation of "life" in the Fifth and Fourteenth Amendments insulated the death penalty from constitutional challenge. The five Justices who concurred in the judgment necessarily rejected this argument, and even the four dissenters, who explicitly acknowledged that the death penalty was not considered impermissibly cruel at the time of the framing, proceeded to evaluate whether anything had changed in the intervening 181 years that nevertheless rendered capital punishment unconstitutional. *Furman*, 408 U. S., at 380–384 (Burger, C. J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting); see also *id.*, at 420 (Powell, J., joined by Burger, C. J., and Blackmun and Rehnquist, JJ., dissenting) ("Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing"). And indeed, the guarantees of procedural fairness contained in the Fifth and Fourteenth Amendments do not resolve the substantive questions relating to the separate limitations imposed by the Eighth Amendment.

IV

The conclusion that I have reached with regard to the constitutionality of the death penalty itself makes my decision in this case particularly difficult. It does not, however, justify a refusal to respect precedents that remain a part of our law. This Court has held that the death penalty is constitutional, and has established a framework for evaluating the constitutionality of particular methods of execution. Under those precedents, whether as interpreted by THE CHIEF JUSTICE or JUSTICE GINSBURG, I am persuaded that the evidence adduced by petitioners fails to prove that Kentucky's lethal injection protocol violates the Eighth Amendment. Accordingly, I join the Court's judgment.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I join the opinion of JUSTICE THOMAS concurring in the judgment. I write separately to provide what I think is needed response to JUSTICE STEVENS' separate opinion.

I

JUSTICE STEVENS concludes as follows: "[T]he imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Ante*, at 86 (opinion concurring in judgment) (internal quotation marks omitted; second bracket in original).

This conclusion is insupportable as an interpretation of the Constitution, which generally leaves it to democratically elected legislatures rather than courts to decide what makes significant contribution to social or public purposes. Besides that more general proposition, the very text of the document recognizes that the death penalty is a permissible legislative choice. The Fifth Amendment expressly requires a

presentment or indictment of a grand jury to hold a person to answer for "a capital, or otherwise infamous crime," and prohibits deprivation of "life" without due process of law. U. S. Const., Amdt. 5. The same Congress that proposed the Eighth Amendment also enacted the Act of April 30, 1790, which made several offenses punishable by death. 1 Stat. 112; see also *Gregg* v. *Georgia*, 428 U. S. 153, 176–178 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). Writing in 1977, Professor Hugo Bedau—no friend of the death penalty himself—observed that "[u]ntil fifteen years ago, save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law." The Courts, the Constitution, and Capital Punishment 118 (1977). There is simply no legal authority for the proposition that the imposition of death as a criminal penalty is unconstitutional other than the opinions in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, which established a nationwide moratorium on capital punishment that JUSTICE STEVENS had a hand in ending four years later in *Gregg*.

II

What prompts JUSTICE STEVENS to repudiate his prior view and to adopt the astounding position that a criminal sanction expressly mentioned in the Constitution violates the Constitution? His analysis begins with what he believes to be the "uncontroversial legal premise" that the "'extinction of life with only marginal contributions to any discernible social or public purposes . . . would be patently excessive' and violative of the Eighth Amendment." *Ante*, at 83 (quoting in part *Furman*, *supra*, at 312 (White, J., concurring)); see also *ante*, at 78 (citing *Gregg*, *supra*, at 183, and n. 28). Even if that were uncontroversial in the abstract (and it is certainly not what occurs to me as the meaning of "cruel and unusual punishments"), it is assuredly controversial (indeed, flatout wrong) as applied to a mode of punishment that is explicitly sanctioned by the Constitution. As to that, *the*

people have determined whether there is adequate contribution to social or public purposes, and it is no business of unelected judges to set that judgment aside. But even if we grant JUSTICE STEVENS his "uncontroversial premise," his application of that premise to the current practice of capital punishment does not meet the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." *Gregg*, *supra*, at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.). That is to say, JUSTICE STEVENS' policy analysis of the constitutionality of capital punishment fails on its own terms.

According to JUSTICE STEVENS, the death penalty promotes none of the purposes of criminal punishment because it neither prevents more crimes than alternative measures nor serves a retributive purpose. *Ante*, at 78. He argues that "the recent rise in statutes providing for life imprisonment without the possibility of parole" means that States have a ready alternative to the death penalty. *Ibid.* Moreover, "[d]espite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders." *Ante*, at 79. Taking the points together, JUSTICE STEVENS concludes that the availability of alternatives, and what he describes as the unavailability of "reliable statistical evidence," renders capital punishment unconstitutional. In his view, the benefits of capital punishment—as compared to other forms of punishment such as life imprisonment—are outweighed by the costs.

These conclusions are not supported by the available data. JUSTICE STEVENS' analysis barely acknowledges the "significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one." Sunstein & Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703, 706 (2005); see also *id.*, at 706, n. 9 (listing the approximately half a dozen studies supporting this conclu-

sion). According to a "leading national study," "each execution prevents some eighteen murders, on average." *Id.*, at 706. "If the current evidence is even roughly correct . . . then a refusal to impose capital punishment will effectively condemn numerous innocent people to death." *Ibid.*

Of course, it may well be that the empirical studies establishing that the death penalty has a powerful deterrent effect are incorrect, and some scholars have disputed its deterrent value. See *ante*, at 79, n. 13. But that is not the point. It is simply not our place to choose one set of responsible empirical studies over another in interpreting the Constitution. Nor is it our place to demand that state legislatures support their criminal sanctions with foolproof empirical studies, rather than commonsense predictions about human behavior. "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Gregg*, *supra*, at 186 (joint opinion of Stewart, Powell, and STEVENS, JJ.). Were JUSTICE STEVENS' current view the constitutional test, even his own preferred criminal sanction—life imprisonment without the possibility of parole—may fail constitutional scrutiny, because it is entirely unclear that enough empirical evidence supports that sanction as compared to alternatives such as life with the possibility of parole.

But even if JUSTICE STEVENS' assertion about the deterrent value of the death penalty were correct, the death penalty would yet be constitutional (as he concedes) if it served the appropriate purpose of retribution. I would think it difficult indeed to prove that a criminal sanction fails to serve a retributive purpose—a judgment that strikes me as inherently subjective and insusceptible of judicial review. JUSTICE STEVENS, however, concludes that, because the Eighth Amendment "protect[s] the inmate from enduring any pun-

ishment that is comparable to the suffering inflicted on his victim," capital punishment serves no retributive purpose at all. *Ante*, at 80–81. The infliction of any pain, according to JUSTICE STEVENS, violates the Eighth Amendment's prohibition against cruel and unusual punishments, but so too does the imposition of capital punishment *without pain* because a criminal penalty lacks a retributive purpose unless it inflicts pain commensurate with the pain that the criminal has caused. In other words, if a punishment is not retributive enough, it is not retributive at all. To state this proposition is to refute it, as JUSTICE STEVENS once understood. "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U. S., at 184 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

JUSTICE STEVENS' final refuge in his cost-benefit analysis is a familiar one: There is a risk that an innocent person might be convicted and sentenced to death—though not a risk that JUSTICE STEVENS can quantify, because he lacks a single example of a person executed for a crime he did not commit in the current American system. See *ante*, at 84–86. His analysis of this risk is thus a series of sweeping condemnations that, if taken seriously, would prevent any punishment under any criminal justice system. According to him, "[t]he prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive." *Ante*, at 84. But prosecutors undoubtedly have a similar concern that *any* unanimous conviction would rarely be returned by 12 randomly selected jurors. That is why they, like defense counsel, are permitted to use the challenges for cause and peremptory challenges that JUSTICE STEVENS finds so troubling, in order to arrive at a jury that both sides believe will be more likely to do justice in a

particular case. JUSTICE STEVENS' concern that prosecutors will be inclined to challenge jurors who will not find a person guilty supports not his conclusion, but the separate (and equally erroneous) conclusion that peremptory challenges and challenges for cause are unconstitutional. According to JUSTICE STEVENS, "the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender." *Ante*, at 84–85. That rationale, however, supports not JUSTICE STEVENS' conclusion that the death penalty is unconstitutional, but the more sweeping proposition that any conviction in a case in which facts are disturbing is suspect—including, of course, convictions resulting in life without parole in those States that do not have capital punishment. The same is true of JUSTICE STEVENS' claim that there is a risk of "discriminatory application of the death penalty." *Ante*, at 85. The same could be said of any criminal penalty, including life without parole; there is no proof that in this regard the death penalty is distinctive.

But of all JUSTICE STEVENS' criticisms of the death penalty, the hardest to take is his bemoaning of "the enormous costs that death penalty litigation imposes on society," including the "burden on the courts and the lack of finality for victim's families." *Ante*, at 81, and n. 17. Those costs, those burdens, and that lack of finality are in large measure the creation of JUSTICE STEVENS and other Justices opposed to the death penalty, who have "encumber[ed] [it] . . . with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it"—the product of their policy views "not shared by the vast majority of the American people." *Kansas* v. *Marsh*, 548 U. S. 163, 186 (2006) (SCALIA, J., concurring).

III

But actually none of this really matters. As JUSTICE STEVENS explains, "'objective evidence, though of great importance, [does] not wholly determine the controversy, for the Constitution contemplates that in the end *our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.*'" *Ante*, at 83 (quoting *Atkins* v. *Virginia*, 536 U. S. 304, 312 (2002); emphasis added; some internal quotation marks omitted). "I have relied *on my own experience* in reaching the conclusion that the imposition of the death penalty" is unconstitutional. *Ante*, at 86 (emphasis added).

Purer expression cannot be found of the principle of rule by judicial fiat. In the face of JUSTICE STEVENS' experience, the experience of all others is, it appears, of little consequence. The experience of the state legislatures and the Congress—who retain the death penalty as a form of punishment—is dismissed as "the product of habit and inattention rather than an acceptable deliberative process." *Ante*, at 78. The experience of social scientists whose studies indicate that the death penalty deters crime is relegated to a footnote. *Ante*, at 79, n. 13. The experience of fellow citizens who support the death penalty is described, with only the most thinly veiled condemnation, as stemming from a "thirst for vengeance." *Ante*, at 80. It is JUSTICE STEVENS' experience that reigns over all.

* * *

I take no position on the desirability of the death penalty, except to say that its value is eminently debatable and the subject of deeply, indeed passionately, held views—which means, to me, that it is preeminently not a matter to be resolved here. And especially not when it is explicitly permitted by the Constitution.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Although I agree that petitioners have failed to establish that Kentucky's lethal injection protocol violates the Eighth Amendment, I write separately because I cannot subscribe to the plurality opinion's formulation of the governing standard. As I understand it, that opinion would hold that a method of execution violates the Eighth Amendment if it poses a substantial risk of severe pain that could be significantly reduced by adopting readily available alternative procedures. *Ante*, at 52. This standard—along with petitioners' proposed "unnecessary risk" standard and the dissent's "untoward risk" standard, *post*, at 114 (opinion of GINSBURG, J.)—finds no support in the original understanding of the Cruel and Unusual Punishments Clause or in our previous method-of-execution cases; casts constitutional doubt on long-accepted methods of execution; and injects the Court into matters it has no institutional capacity to resolve. Because, in my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain, I concur only in the judgment.

I

The Eighth Amendment's prohibition on the "inflict[ion]" of "cruel and unusual punishments" must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights. JUSTICE STEVENS' ruminations notwithstanding, see *ante*, at 78–86 (opinion concurring in judgment), it is clear that the Eighth Amendment does not prohibit the death penalty. That is evident both from the ubiquity of the death penalty in the founding era, see S. Banner, The Death Penalty: An American History 23 (2002) (hereinafter Banner) (noting that, in the late 18th century, the death penalty was "the standard penalty for all serious crimes"), and from the Constitution's express provision for capital punishment, see, *e. g.*, Amdt. 5 (requiring an indict-

ment or presentment of a grand jury to hold a person for "a capital, or otherwise infamous crime," and prohibiting deprivation of "life" without due process of law).

That the Constitution permits capital punishment in principle does not, of course, mean that all methods of execution are constitutional. In English and early colonial practice, the death penalty was not a uniform punishment, but rather a range of punishments, some of which the Framers likely regarded as cruel and unusual. Death by hanging was the most common mode of execution both before and after 1791, and there is no doubt that it remained a permissible punishment after enactment of the Eighth Amendment. "An ordinary death by hanging was not, however, the harshest penalty at the disposal of the seventeenth- and eighteenth-century state." Banner 70. In addition to hanging, which was intended to, and often did, result in a quick and painless death, "[o]fficials also wielded a set of tools capable of *intensifying* a death sentence," that is, "ways of producing a punishment worse than death." *Id.*, at 54.

One such "tool" was burning at the stake. Because burning, unlike hanging, was always painful and destroyed the body, it was considered "a form of super-capital punishment, worse than death itself." *Id.*, at 71. Reserved for offenders whose crimes were thought to pose an especially grave threat to the social order—such as slaves who killed their masters and women who killed their husbands—burning a person alive was so dreadful a punishment that sheriffs sometimes hanged the offender first "as an act of charity." *Id.*, at 72.

Other methods of intensifying a death sentence included "gibbeting," or hanging the condemned in an iron cage so that his body would decompose in public view, see *id.*, at 72–74, and "public dissection," a punishment Blackstone associated with murder, 4 W. Blackstone, Commentaries 376 (W. Lewis ed. 1897) (hereinafter Blackstone). But none of these was the worst fate a criminal could meet. That was

reserved for the most dangerous and reprobate offenders—traitors. "The punishment of high treason," Blackstone wrote, was "very solemn and terrible," *id.*, at 92, and involved "embowelling alive, beheading, and quartering," *id.*, at 376. Thus, the following death sentence could be pronounced on seven men convicted of high treason in England:

> "'That you and each of you, be taken to the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be hanged by the necks, not till you are dead; that you be severally taken down, while yet alive, and your bowels be taken out and burnt before your faces—that your heads be then cut off, and your bodies cut in four quarters, to be at the King's disposal. And God Almighty have mercy on your souls.'" G. Scott, History of Capital Punishment 179 (1950).*

The principal object of these aggravated forms of capital punishment was to terrorize the criminal, and thereby more effectively deter the crime. Their defining characteristic was that they were purposely designed to inflict pain and suffering beyond that necessary to cause death. As Blackstone put it, "in very atrocious crimes, other circumstances of terror, pain, or disgrace [were] superadded." 4 Blackstone 376. These "superadded" circumstances "were care-

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*As gruesome as these methods of execution were, they were not the worst punishments the Framers would have been acquainted with. After surveying the various "superadd[itions]" to the death penalty in English law, as well as lesser punishments such as "mutilation or dismembering, by cutting off the hand or ears" and stigmatizing the offender "by slitting the nostrils, or branding in the hand or cheek," Blackstone was able to congratulate his countrymen on their refinement, in contrast to the barbarism on the Continent: "Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment to be met with in the criminal codes of almost every other nation in Europe." 4 Blackstone 377.

fully handed out to apply terror where it was thought to be most needed," and were designed "to ensure that death would be slow and painful, and thus all the more frightening to contemplate." Banner 70.

Although the Eighth Amendment was not the subject of extensive discussion during the debates on the Bill of Rights, there is good reason to believe that the Framers viewed such enhancements to the death penalty as falling within the prohibition of the Cruel and Unusual Punishments Clause. By the late 18th century, the more violent modes of execution had "dwindled away," *id.*, at 76, and would for that reason have been "unusual" in the sense that they were no longer "regularly or customarily employed," *Harmelin* v. *Michigan*, 501 U. S. 957, 976 (1991) (opinion of SCALIA, J.); see also *Weems* v. *United States*, 217 U. S. 349, 395 (1910) (White, J., dissenting) (noting that, "prior to the formation of the Constitution, the necessity for the protection afforded by the cruel and unusual punishment guarantee of the English bill of rights had ceased to be a matter of concern, because as a rule the cruel bodily punishments of former times were no longer imposed"). Embellishments upon the death penalty designed to inflict pain for pain's sake also would have fallen comfortably within the ordinary meaning of the word "cruel." See 1 S. Johnson, A Dictionary of the English Language 459 (1773) (defining "cruel" to mean "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting"); 1 N. Webster, An American Dictionary of the English Language 52 (1828) (defining "cruel" as "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness").

Moreover, the evidence we do have from the debates on the Constitution confirms that the Eighth Amendment was intended to disable Congress from imposing torturous punishments. It was the absence of such a restriction on Congress' power in the Constitution as drafted in Philadelphia

in 1787 that led one delegate at the Massachusetts ratifying convention to complain that Congress was "nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 111 (2d ed. 1891). Similarly, during the ratification debate in Virginia, Patrick Henry objected to the lack of a Bill of Rights, in part because there was nothing to prevent Congress from inflicting "tortures, or cruel and barbarous punishment[s]." 3 *id.*, at 447–448.

Early commentators on the Constitution likewise interpreted the Cruel and Unusual Punishments Clause as referring to torturous punishments. One commentator viewed the Eighth Amendment as prohibiting "horrid modes of torture":

> "The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion." J. Bayard, A Brief Exposition of the Constitution of the United States 154 (2d ed. 1840).

Similarly, another commentator found "sufficient reasons" for the Eighth Amendment in the "barbarous and cruel punishments" inflicted in less enlightened countries:

> "Under the [Eighth] amendment the infliction of cruel and unusual punishments, is also prohibited. The various barbarous and cruel punishments inflicted under the laws of some other countries, and which profess not to be behind the most enlightened nations on earth in civilization and refinement, furnish sufficient reasons for this express prohibition. Breaking on the wheel, flay-

> ing alive, rending asunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution." B. Oliver, The Rights of An American Citizen 186 (1832) (reprint 1970).

So barbaric were the punishments prohibited by the Eighth Amendment that Joseph Story thought the provision "wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct." 3 J. Story, Commentaries on the Constitution of the United States 750 (1833).

II

Consistent with the original understanding of the Cruel and Unusual Punishments Clause, this Court's cases have repeatedly taken the view that the Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment. See, *e. g.*, *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) ("[T]he primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment"); *Weems*, *supra*, at 390 (White, J., dissenting) ("[I]t may not be doubted, and indeed is not questioned by any one, that the cruel punishments against which the bill of rights provided were the atrocious, sanguinary and inhuman punishments which had been inflicted in the past upon the persons of criminals"). That view has permeated our method-of-execution cases. Thrice the Court has considered a challenge to a modern method of execution, and thrice it has rejected the challenge, each time emphasizing that the Eighth Amendment is aimed at methods of execution purposely designed to inflict pain.

In the first case, *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), the Court rejected the contention that death by firing squad was cruel and unusual. In so doing, it reviewed the various

modes of execution catalogued by Blackstone, repeating his observation that "in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded." *Id.*, at 135. The Court found it "safe to affirm that punishments of torture, such as those mentioned by [Blackstone], and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]." *Id.*, at 136. The unanimous Court had no difficulty concluding that death by firing squad did not "fal[l] within that category." *Ibid.*

Similarly, when the Court in *In re Kemmler*, 136 U. S. 436, 446 (1890), unanimously rejected a challenge to electrocution, it interpreted the Eighth Amendment to prohibit punishments that "were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like":

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.*, at 447.

Finally, in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947), the Court rejected the petitioner's contention that the Eighth Amendment prohibited Louisiana from subjecting him to a second attempt at electrocution, the first attempt having failed when "[t]he executioner threw the switch but, presumably because of some mechanical difficulty, death did not result." *Id.*, at 460 (plurality opinion). Characterizing the abortive attempt as "an accident, with no suggestion of malevolence," *id.*, at 463, the plurality opinion concluded that "the fact that petitioner ha[d] already been subjected to a current of electricity [did] not make his subsequent execution any more cruel in the constitutional sense than any other execution":

> "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of pun-

ishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." *Id.*, at 464.

III

In light of this consistent understanding of the Cruel and Unusual Punishments Clause as forbidding purposely torturous punishments, it is not surprising that even an ardent abolitionist was constrained to acknowledge in 1977 that "[a]n unbroken line of interpreters has held that it was the original understanding and intent of the framers of the Eighth Amendment . . . to proscribe as 'cruel and unusual' *only* such modes of execution as compound the simple infliction of death with added cruelties or indignities." H. Bedau, The Courts, the Constitution, and Capital Punishment 35. What is surprising is the plurality's willingness to discard this unbroken line of authority in favor of a standard that finds no support in the original understanding of the Eighth Amendment or in our method-of-execution cases and that, disclaimers notwithstanding, "threaten[s] to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Ante*, at 51.

We have never suggested that a method of execution is "cruel and unusual" within the meaning of the Eighth Amendment simply because it involves a risk of pain—whether "substantial," "unnecessary," or "untoward"—that could be reduced by adopting alternative procedures. And for good reason. It strains credulity to suggest that the defining characteristic of burning at the stake, disemboweling, drawing and quartering, beheading, and the like was that

they involved risks of pain that could be eliminated by using alternative methods of execution. Quite plainly, what defined these punishments was that they were *designed* to inflict torture as a way of enhancing a death sentence; they were *intended* to produce a penalty worse than death, to accomplish something "more than the mere extinguishment of life." *Kemmler*, *supra*, at 447. The evil the Eighth Amendment targets is intentional infliction of gratuitous pain, and that is the standard our method-of-execution cases have explicitly or implicitly invoked.

Thus, the Court did not find it necessary in *Wilkerson* to conduct a comparative analysis of death by firing squad as opposed to hanging or some other method of execution. Nor did the Court inquire into the precise procedures used to execute an individual by firing squad in order to determine whether they involved risks of pain that could be alleviated by adopting different procedures. It was enough that death by firing squad was well established in military practice, 99 U. S., at 134–135, and plainly did not fall within the "same line of unnecessary cruelty" as the punishments described by Blackstone, *id.*, at 136.

The same was true in *Kemmler*. One searches the opinion in vain for a comparative analysis of electrocution versus other methods of execution. The Court observed that the New York Legislature had adopted electrocution in order to replace hanging with "'the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.'" 136 U. S., at 444. But there is no suggestion that the Court thought it necessary to sift through the "voluminous mass of evidence . . . taken [in the courts below] as to the effect of electricity as an agent of death," *id.*, at 442, in order to confirm that electrocution in fact involved less substantial risks of pain or lingering death than hanging. The court below had rejected the challenge because the "act was passed in the effort to devise a more

humane method of reaching the result," and "courts were bound to presume that the legislature was possessed of the facts upon which it took action." *Id.*, at 447. Treating the lower court's decision "as involving an adjudication that the statute was not repugnant to the Federal Constitution," *ibid.*, the Court found that conclusion "so plainly right," *ibid.*, that it had "no hesitation" in denying the writ of error, *id.*, at 449.

Likewise in *Resweber*, the Court was confronted in dramatic fashion with the reality that the electric chair involved risks of error or malfunction that could result in excruciating pain. See 329 U. S., at 480, n. 2 (Burton, J., dissenting) (quoting affidavits from the petitioner's brief recounting that during the unsuccessful first attempt at electrocution, the petitioner's "'lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor'"). But absent "malevolence" or a "purpose to inflict unnecessary pain," the Court concluded that the Constitution did not prohibit Louisiana from subjecting the petitioner to those very risks a second time in order to carry out his death sentence. *Id.*, at 463, 464 (plurality opinion); *id.*, at 471 (Frankfurter, J., concurring); see also *Furman* v. *Georgia*, 408 U. S. 238, 326–327 (1972) (Marshall, J., concurring) (describing *Resweber* as holding "that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular case"). No one suggested that Louisiana was required to implement additional safeguards or alternative procedures in order to reduce the risk of a second malfunction. And it was the *dissenters* in *Resweber* who insisted that the absence of an intent to inflict pain was irrelevant. 329 U. S., at 477 (Burton, J., dissenting) ("The intent of the executioner cannot lessen the torture or excuse the result").

IV

Aside from lacking support in history or precedent, the various risk-based standards proposed in this case suffer from other flaws, not the least of which is that they cast substantial doubt on every method of execution other than lethal injection. It may well be that other methods of execution such as hanging, the firing squad, electrocution, and lethal gas involve risks of pain that could be eliminated by switching to lethal injection. Indeed, they have been attacked as unconstitutional for that very reason. See, *e. g.*, *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654, 656–657 (1992) (STEVENS, J., dissenting) (arguing that lethal gas violates the Eighth Amendment because of "the availability of more humane and less violent methods of execution," namely, lethal injection); *Glass* v. *Louisiana*, 471 U. S. 1080, 1093 (1985) (Brennan, J., dissenting from denial of certiorari) (arguing that electrocution violates the Eighth Amendment because it poses risks of pain that could be alleviated by "other currently available means of execution," such as lethal injection); *Campbell* v. *Wood*, 18 F. 3d 662, 715 (CA9 1994) (Reinhardt, J., concurring and dissenting) (arguing that hanging violates the Eighth Amendment because it involves risks of pain and mutilation not presented by lethal injection). But the notion that the Eighth Amendment permits only one mode of execution, or that it requires an anesthetized death, cannot be squared with the history of the Constitution.

It is not a little ironic—and telling—that lethal injection, hailed just a few years ago as *the* humane alternative in light of which every other method of execution was deemed an unconstitutional relic of the past, is the subject of today's challenge. It appears the Constitution is "evolving" even faster than I suspected. And it is obvious that, for some who oppose capital punishment on policy grounds, the only acceptable end point of the evolution is for this Court, in an exercise of raw judicial power unsupported by the text or

history of the Constitution, or even by a contemporary moral consensus, to strike down the death penalty as cruel and unusual in all circumstances. In the meantime, though, the next best option for those seeking to abolish the death penalty is to embroil the States in never-ending litigation concerning the adequacy of their execution procedures. But far from putting an end to abusive litigation in this area, and thereby vindicating in some small measure the States' "significant interest in meting out a sentence of death in a timely fashion," *Nelson* v. *Campbell*, 541 U. S. 637, 644 (2004), today's decision is sure to engender more litigation. At what point does a risk become "substantial"? Which alternative procedures are "feasible" and "readily implemented"? When is a reduction in risk "significant"? What penological justifications are "legitimate"? Such are the questions the lower courts will have to grapple with in the wake of today's decision. Needless to say, we have left the States with nothing resembling a bright-line rule.

Which brings me to yet a further problem with comparative-risk standards: They require courts to resolve medical and scientific controversies that are largely beyond judicial ken. Little need be said here, other than to refer to the various opinions filed by my colleagues today. Under the competing risk standards advanced by the plurality opinion and the dissent, for example, the difference between a lethal injection procedure that satisfies the Eighth Amendment and one that does not may well come down to one's judgment with respect to something as hairsplitting as whether an eyelash stroke is necessary to ensure that the inmate is unconscious, or whether instead other measures have already provided sufficient assurance of unconsciousness. Compare *post*, at 118 (GINSBURG, J., dissenting) (criticizing Kentucky's protocol because "[n]o one calls the inmate's name, shakes him, brushes his eyelashes to test for a reflex, or applies a noxious stimulus to gauge his response"), with *ante*, at 60–61 (rejecting the dissent's criticisms because

"an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures"). We have neither the authority nor the expertise to micromanage the States' administration of the death penalty in this manner. There is simply no reason to believe that "unelected" judges without scientific, medical, or penological training are any better suited to resolve the delicate issues surrounding the administration of the death penalty than are state administrative personnel specifically charged with the task. Cf. *ante*, at 74–75 (STEVENS, J., concurring in judgment) (criticizing the States' use of the three-drug protocol because "[i]n the majority of States that use the three-drug protocol, the drugs were selected by unelected department of correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance").

In short, I reject as both unprecedented and unworkable any standard that would require the courts to weigh the relative advantages and disadvantages of different methods of execution or of different procedures for implementing a given method of execution. To the extent that there is any comparative element to the inquiry, it should be limited to whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad. See, *e. g.*, *Gray* v. *Lucas*, 463 U. S. 1237, 1239–1240 (1983) (Burger, C. J., concurring in denial of certiorari) (rejecting an Eighth Amendment challenge to lethal gas because the petitioner had not shown that "'the pain and terror resulting from death by cyanide gas is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment right'" (quoting *Gray* v. *Lucas*, 710 F. 2d 1048, 1061 (CA5 1983))); *Hernandez* v. *State*, 43 Ariz. 424, 441, 32 P. 2d 18, 25 (1934) ("The fact that [lethal gas] is less painful and more humane than hanging is all that is required to refute completely the charge that it constitutes cruel and un-

usual punishment within the meaning of this expression as used in [the Eighth Amendment]").

V

Judged under the proper standard, this is an easy case. It is undisputed that Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane, not to add elements of terror, pain, or disgrace to the death penalty. And it is undisputed that, if administered properly, Kentucky's lethal injection protocol will result in a swift and painless death. As the Sixth Circuit observed in rejecting a similar challenge to Tennessee's lethal injection protocol, we "do not have a situation where the State has any intent (or anything approaching intent) to inflict unnecessary pain; the complaint is that the State's *pain-avoidance procedure* may fail because the executioners may make a mistake in implementing it." *Workman* v. *Bredesen*, 486 F. 3d 896, 907 (2007). But "[t]he risk of negligence in implementing a death-penalty procedure . . . does not establish a cognizable Eighth Amendment claim." *Id.*, at 907–908. Because Kentucky's lethal injection protocol is designed to eliminate pain rather than to inflict it, petitioners' challenge must fail. I accordingly concur in the Court's judgment affirming the decision below.

JUSTICE BREYER, concurring in the judgment.

Assuming the lawfulness of the death penalty itself, petitioners argue that Kentucky's method of execution, lethal injection, nonetheless constitutes a constitutionally forbidden, "cruel and unusual punishmen[t]." U. S. Const., Amdt. 8. In respect to *how* a court should review such a claim, I agree with JUSTICE GINSBURG. She highlights the relevant question, whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering. *Post*, at 123 (dissenting opinion). I agree that the relevant factors—the "degree of risk," the "magnitude of pain," and

the "availability of alternatives"—are interrelated and each must be considered. *Post*, at 116. At the same time, I believe that the legal merits of the kind of claim presented must inevitably turn not so much upon the wording of an intermediate standard of review as upon facts and evidence. And I cannot find, either in the record in this case or in the literature on the subject, sufficient evidence that Kentucky's execution method poses the "significant and unnecessary risk of inflicting severe pain" that petitioners assert. Brief for Petitioners 28.

In respect to the literature, I have examined the periodical article that seems first to have brought widespread legal attention to the claim that lethal injection might bring about unnecessary suffering. See *ante*, at 51–52, n. 2 (plurality opinion); Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Ford. L. Rev. 49, 105, n. 366 (2007) (collecting cases in which condemned inmates cited the Lancet study). The article, by Dr. Leonidas G. Koniaris, Teresa A. Zimmers (of the University of Miami School of Medicine), and others, appeared in the April 16, 2005, issue of the Lancet, an eminent, peer-reviewed medical journal. See Koniaris, Zimmers, Lubarsky, & Sheldon, Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (hereinafter Lancet Study). The authors examined "autopsy toxicology results from 49 executions in Arizona, Georgia, North Carolina, and South Carolina." *Id.*, at 1412–1413. The study noted that lethal injection usually consists of sequential administration of a barbiturate (sodium thiopental), followed by injection of a paralyzing agent (pancuronium bromide) and a heart-attack-inducing drug (potassium chloride). The study focused on the effectiveness of the first drug in anesthetizing the inmate. See *id.*, at 1412. It noted that the four States used 2 grams of thiopental. *Id.*, at 1413. (Kentucky follows a similar system but currently uses 3 grams of sodium thiopental. See *ante*, at 44–46 (plurality opinion).) Although the sodium thiopen-

tal dose (of, say, 2 grams) was several times the dose used in ordinary surgical operations, the authors found that the level of barbiturate present in the bloodstream several hours (or more) after death was *lower* than the level one might expect to find during an operation. Lancet Study 1413–1414. With certain qualifications, they state that "21 (43%)" of the examined instances "had [thiopental] concentrations consistent with consciousness," *id.*, at 1413—a fact that should create considerable concern given the related likelihood of unexpressed suffering. The authors suggest that, among other things, inadequate training may help explain the results. *Id.*, at 1414.

The Lancet Study, however, may be seriously flawed. In its September 24, 2005, issue, the Lancet published three responses. The first, by one of the initial referees, Jonathan I. Groner of Children's Hospital, Columbus, Ohio, claimed that a low level of thiopental in the bloodstream does not necessarily mean that an inadequate dose was given, for, under circumstances likely common to lethal injections, thiopental can simply diffuse from the bloodstream into surrounding tissues. See Inadequate Anaesthesia in Lethal Injection for Execution, 366 Lancet 1073. And a long pause between death and measurement means that this kind of diffusion likely occurred. See *ibid.* For this reason and others, Groner, who said he had initially "expressed strong support for the article," had become "concerned" that its key finding "may be erroneous because of a lack of equipoise in the study." *Ibid.*

The second correspondents, Mark J. S. Heath (petitioners' expert in their trial below), Donald R. Stanski, and Derrick J. Pounder, respectively of the Department of Anesthesiology, Columbia University, of Stanford University School of Medicine, and the University of Dundee, United Kingdom, concluded that "Koniaris and colleagues do not present scientifically convincing data to justify their conclusion that so large a proportion of inmates have experienced awareness

during lethal injection." *Ibid.* These researchers noted that because the blood samples were taken "several hours to days after" the inmates' deaths, the postmortem concentrations of thiopental—a lipophilic drug that diffuses from blood into tissue—could not be relied on as accurate indicators for concentrations in the bloodstream during life. *Ibid.* See also *ante*, at 51–52, n. 2 (plurality opinion).

The third correspondents, Robyn S. Weisman, Jeffrey N. Bernstein, and Richard S. Weisman, of the University of Miami, School of Medicine, and Florida Poison Information Center, said that "[p]ost-mortem drug concentrations are extremely difficult to interpret and there is substantial variability in results depending on timing, anatomical origin of the specimen, and physical and chemical properties of the drug." 366 Lancet, at 1074. They believed that the original finding "requires further assessment." *Ibid.*

The authors of the original study replied, defending the accuracy of their findings. See *id.*, at 1074–1076. Yet, neither the petition for certiorari nor any of the briefs filed in this Court (including seven *amici curiae* briefs supporting petitioners) make any mention of the Lancet Study, which was published during petitioners' trial. In light of that fact, and the responses to the original study, a judge, nonexpert in these matters, cannot give the Lancet Study significant weight.

The literature also contains a detailed article on the subject, which appeared in 2002 in the Ohio State Law Journal. The author, Professor Deborah W. Denno, examined executions by lethal injection in the 36 States where thiopental is used. See When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us, 63 Ohio St. L. J. 63. In Table 9, the author lists 31 "Botched Lethal Injection Executions" in the time from our decision in *Gregg* v. *Georgia*, 429 U. S. 1301 (1976), through 2001. See Denno, 63 Ohio St. L. J., at 139–141. Of these, 19 involved a prob-

lem of locating a suitable vein to administer the chemicals. *Ibid.* Eleven of the remaining twelve apparently involved strong, readily apparent physical reactions. *Ibid.* One, taking place in Illinois in 1990, is described as involving "some indication that, while appearing calm on the outside due to the paralyzing drugs, [the inmate] suffered excruciating pain." *Id.*, at 139. The author adds that "[t]here were reports of faulty equipment and inexperienced personnel." *Ibid.* This article, about which Professor Denno testified at petitioners' trial and on which petitioners rely in this Court, may well provide cause for concern about the administration of the lethal injection. But it cannot materially aid petitioners here. That is because, as far as the record here reveals, and as the Kentucky courts found, Kentucky's use of trained phlebotomists and the presence of observers should prevent the kind of "botched" executions that Denno's Table 9 documents.

The literature also casts a shadow of uncertainty upon the ready availability of some of the alternatives to lethal execution methods. Petitioners argued to the trial court, for example, that Kentucky should eliminate the use of a paralytic agent, such as pancuronium bromide, which could, by preventing any outcry, mask suffering an inmate might be experiencing because of inadequate administration of the anesthetic. See Brief for Petitioners 51–57; Reply Brief for Petitioners 18, and n. 6. And they point out that use of pancuronium bromide to euthanize animals is contrary to veterinary standards. See *id.*, at 20 (citing Brief for Dr. Kevin Concannon et al. as *Amici Curiae* 17–18). See also *id.*, at 4, 18, n. 5 (noting that Kentucky, like 22 other States, prohibits the use of neuromuscular blocking agents in euthanizing animals). In the Netherlands, however, the use of pancuronium bromide is recommended for purposes of lawful assisted suicide. See *ante*, at 58 (plurality opinion) (discussing the Royal Dutch Society for the Advancement of Pharmacy's recommendation of the use of a muscle relaxant

such as pancuronium in addition to thiopental). See also Kimsma, Euthanasia and Euthanizing Drugs in The Netherlands, reprinted in Drug Use in Assisted Suicide and Euthanasia 193, 199–202 (M. Battin & A. Lipman eds. 1996) (discussing use of neuromuscular relaxants). Why, one might ask, if the use of pancuronium bromide is undesirable, would those in the Netherlands, interested in practices designed to bring about a humane death, recommend the use of that, or similar, drugs? Petitioners pointed out that in the Netherlands, physicians trained in anesthesiology are involved in assisted suicide, while that is not the case in Kentucky. See Tr. of Oral Arg. 55. While important, that difference does not resolve the apparently conflicting views about the inherent propriety or impropriety of use of this drug to extinguish human life humanely.

Similarly, petitioners argue for better trained personnel. But it is clear that both the American Medical Association (AMA) and the American Nursing Association (ANA) have rules of ethics that strongly oppose their members' participation in executions. See Brief for American Society of Anesthesiologists as *Amicus Curiae* 2–3 (citing AMA, Code of Medical Ethics, Policy E–2.06 Capital Punishment (2000), online at http://www.ama-assn.org/ama1/pub/upload/mm/369/e206capitalpunish.pdf (all Internet materials as visited Apr. 10, 2008, and available in Clerk of Court's case file)); ANA, Position Statement: Nurses' Participation in Capital Punishment (1994), online at http://nursingworld.org/MainmenuCategories/HealthcareandPolicyIssues/ANAPositionStatements/EthicsandHumanRights.aspx (noting that nurses' participation in executions "is viewed as contrary to the fundamental goals and ethical traditions of the profession"). Cf. Ky. Rev. Stat. Ann. §431.220(3) (West 2006) (Kentucky prohibiting a physician from participating in the "conduct of an execution," except to certify the cause of death). And these facts suggest that finding better trained personnel may be more difficult than might, at first blush, appear.

Nor can I find in the record in this case any stronger evidence in petitioners' favor than the literature itself provides of an untoward, readily avoidable risk of severe pain. Indeed, JUSTICE GINSBURG has accepted what I believe is petitioners' strongest claim, namely, Kentucky should require more thorough testing as to unconsciousness. See *post*, at 117–123. In respect to this matter, however, I must agree with the plurality and JUSTICE STEVENS. The record provides too little reason to believe that such measures, if adopted in Kentucky, would make a significant difference.

The upshot is that I cannot find, either in the record or in the readily available literature that I have seen, sufficient grounds to believe that Kentucky's method of lethal injection creates a significant risk of unnecessary suffering. The death penalty itself, of course, brings with it serious risks, for example, risks of executing the wrong person, see, *e. g.*, *ante*, at 85–86 (STEVENS, J., concurring in judgment), risks that unwarranted animus (in respect, *e. g.*, to the race of victims) may play a role, see, *e. g.*, *ante*, at 85, risks that those convicted will find themselves on death row for many years, perhaps decades, to come, see *Smith* v. *Arizona*, 552 U. S. 985 (2007) (BREYER, J., dissenting from denial of certiorari). These risks in part explain why that penalty is so controversial. But the lawfulness of the death penalty is not before us. And petitioners' proof and evidence, while giving rise to legitimate concern, do not show that Kentucky's method of applying the death penalty amounts to "cruel and unusual punishmen[t]."

For these reasons, I concur in the judgment.

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

It is undisputed that the second and third drugs used in Kentucky's three-drug lethal injection protocol, pancuronium bromide and potassium chloride, would cause a conscious inmate to suffer excruciating pain. Pancuronium bromide

paralyzes the lung muscles and results in slow asphyxiation. App. 435, 437, 625. Potassium chloride causes burning and intense pain as it circulates throughout the body. *Id.*, at 348, 427, 444, 600, 626. Use of pancuronium bromide and potassium chloride on a conscious inmate, the plurality recognizes, would be "constitutionally unacceptable." *Ante*, at 53.

The constitutionality of Kentucky's protocol therefore turns on whether inmates are adequately anesthetized by the first drug in the protocol, sodium thiopental. Kentucky's system is constitutional, the plurality states, because "petitioners have not shown that the risk of an inadequate dose of the first drug is substantial." *Ante*, at 53–54. I would not dispose of the case so swiftly given the character of the risk at stake. Kentucky's protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs. I would vacate and remand with instructions to consider whether Kentucky's omission of those safeguards poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain.

I

The Court has considered the constitutionality of a specific method of execution on only three prior occasions. Those cases, and other decisions cited by the parties and *amici*, provide little guidance on the standard that should govern petitioners' challenge to Kentucky's lethal injection protocol.

In *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), the Court held that death by firing squad did not rank among the "cruel and unusual punishments" banned by the Eighth Amendment. In so ruling, the Court did not endeavor "to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." *Id.*, at 135–136. But it was "safe to affirm," the Court stated, that "punishments of torture . . . , and all others in the same line of unnecessary cruelty, are forbidden." *Id.*, at 136.

Next, in *In re Kemmler*, 136 U. S. 436 (1890), death by electrocution was the assailed method of execution.[1] The Court reiterated that the Eighth Amendment prohibits "torture" and "lingering death." *Id.*, at 447. The word "cruel," the Court further observed, "implies . . . something inhuman . . . something more than the mere extinguishment of life." *Ibid.* Those statements, however, were made *en passant*. *Kemmler*'s actual holding was that the Eighth Amendment does not apply to the States, *id.*, at 448–449,[2] a proposition we have since repudiated, see, *e. g.*, *Robinson* v. *California*, 370 U. S. 660 (1962).

Finally, in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947), the Court rejected Eighth and Fourteenth Amendment challenges to a reelectrocution following an earlier attempt that failed to cause death. The plurality opinion in that case first stated: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." *Id.*, at 463. But the very next sentence varied the formulation; it referred to the "[p]rohibition against the wanton infliction of pain." *Ibid.*

No clear standard for determining the constitutionality of a method of execution emerges from these decisions. Moreover, the age of the opinions limits their utility as an aid to resolution of the present controversy. The Eighth Amendment, we have held, "'must draw its meaning from the evolving standards of decency that mark the progress of a

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[1] Hanging was the State's prior mode of execution. Electrocution, considered "less barbarous," indeed "the most humane" way to administer the death penalty, was believed at the time to "result in instantaneous, and consequently in painless, death." *In re Kemmler*, 136 U. S. 436, 443–444 (1890) (internal quotation marks omitted).

[2] The Court also ruled in *Kemmler* that the State's election to carry out the death penalty by electrocution in lieu of hanging encountered no Fourteenth Amendment shoal: No privilege or immunity of United States citizenship was entailed, nor did the Court discern any deprivation of due process. *Id.*, at 448–449.

maturing society.'" *Atkins* v. *Virginia*, 536 U. S. 304, 311–312 (2002) (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)). *Wilkerson* was decided 129 years ago, *Kemmler* 118 years ago, and *Resweber* 61 years ago. Whatever little light our prior method-of-execution cases might shed is thus dimmed by the passage of time.

Further phrases and tests can be drawn from more recent decisions, for example, *Gregg* v. *Georgia*, 428 U. S. 153 (1976). Speaking of capital punishment in the abstract, the lead opinion said that the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain," *id.*, at 173 (joint opinion of Stewart, Powell, and STEVENS, JJ.); the same opinion also cautioned that a death sentence cannot "be imposed under sentencing procedures that creat[e] a substantial risk that it would be inflicted in an arbitrary and capricious manner," *id.*, at 188.

Relying on *Gregg* and our earlier decisions, the Kentucky Supreme Court stated that an execution procedure violates the Eighth Amendment if it "creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death." 217 S. W. 3d 207, 209, 210 (2006). Petitioners respond that courts should consider "(a) the severity of pain risked, (b) the likelihood of that pain occurring, *and* (c) the extent to which alternative means are feasible." Brief for Petitioners 38 (emphasis added). The plurality settles somewhere in between, requiring a "substantial risk of serious harm" and considering whether a "feasible, readily implemented" alternative can "significantly reduce" that risk. *Ante*, at 52 (internal quotation marks omitted).

I agree with petitioners and the plurality that the degree of risk, magnitude of pain, and availability of alternatives must be considered. I part ways with the plurality, however, to the extent its "substantial risk" test sets a fixed threshold for the first factor. The three factors are interrelated; a strong showing on one reduces the importance of the others.

Lethal injection as a mode of execution can be expected, in most instances, to result in painless death. Rare though errors may be, the consequences of a mistake about the condemned inmate's consciousness are horrendous and effectively undetectable after injection of the second drug. Given the opposing tugs of the degree of risk and magnitude of pain, the critical question here, as I see it, is whether a feasible alternative exists. Proof of "a slightly or marginally safer alternative" is, as the plurality notes, insufficient. *Ante*, at 51. But if readily available measures can materially increase the likelihood that the protocol will cause no pain, a State fails to adhere to contemporary standards of decency if it declines to employ those measures.

II

Kentucky's Legislature adopted lethal injection as a method of execution in 1998. See 1998 Ky. Acts ch. 220, p. 777, Ky. Rev. Stat. Ann. § 431.220(1)(a) (West 2006). Lawmakers left the development of the lethal injection protocol to officials in the Department of Corrections. Those officials, the trial court found, were "given the task without the benefit of scientific aid or policy oversight." App. 768. "Kentucky's protocol," that court observed, "was copied from other states and accepted without challenge." *Ibid.* Kentucky "did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned." *Id.*, at 760, ¶3. Instead, the trial court noted, Kentucky followed the path taken in other States that "simply fell in line" behind the three-drug protocol first developed by Oklahoma in 1977. *Id.*, at 756. See also *ante*, at 43, n. 1 (plurality opinion).

Kentucky's protocol begins with a careful measure: Only medical professionals may perform the venipunctures and establish intravenous (IV) access. Members of the IV team must have at least one year's experience as a certified medi-

cal assistant, phlebotomist, emergency medical technician (EMT), paramedic, or military corpsman. App. 984; *ante*, at 55 (plurality opinion). Kentucky's IV team currently has two members: a phlebotomist with 8 years' experience and an EMT with 20 years' experience. App. 273–274. Both members practice siting catheters at ten lethal injection training sessions held annually. *Id.*, at 984.

Other than using qualified and trained personnel to establish IV access, however, Kentucky does little to ensure that the inmate receives an effective dose of sodium thiopental. After siting the catheters, the IV team leaves the execution chamber. *Id.*, at 977. From that point forward, only the warden and deputy warden remain with the inmate. *Id.*, at 276. Neither the warden nor the deputy warden has any medical training.

The warden relies on visual observation to determine whether the inmate "appears" unconscious. *Id.*, at 978. In Kentucky's only previous execution by lethal injection, the warden's position allowed him to see the inmate best from the waist down, with only a peripheral view of the inmate's face. See *id.*, at 213–214. No other check for consciousness occurs before injection of pancuronium bromide. Kentucky's protocol does not include an automatic pause in the "rapid flow" of the drugs, *id.*, at 978, or any of the most basic tests to determine whether the sodium thiopental has worked. No one calls the inmate's name, shakes him, brushes his eyelashes to test for a reflex, or applies a noxious stimulus to gauge his response.

Nor does Kentucky monitor the effectiveness of the sodium thiopental using readily available equipment, even though the inmate is already connected to an electrocardiogram (EKG), *id.*, at 976. A drop in blood pressure or heart rate after injection of sodium thiopental would not prove that the inmate is unconscious, see *id.*, at 579–580; *ante*, at 59 (plurality opinion), but would signal that the drug has

entered the inmate's bloodstream, see App. 424, 498, 578, 580; 8 Tr. 1099 (May 2, 2005). Kentucky's own expert testified that the sodium thiopental should "cause the inmate's blood pressure to become very, very low," App. 578, and that a precipitous drop in blood pressure would "confir[m]" that the drug was having its expected effect, *id.*, at 580. Use of a blood pressure cuff and EKG, the record shows, is the standard of care in surgery requiring anesthesia. *Id.*, at 539.[3]

A consciousness check supplementing the warden's visual observation before injection of the second drug is easily implemented and can reduce a risk of dreadful pain. Pancuronium bromide is a powerful paralytic that prevents all voluntary muscle movement. Once it is injected, further monitoring of the inmate's consciousness becomes impractical without sophisticated equipment and training. Even if the inmate were conscious and in excruciating pain, there would be no visible indication.[4]

Recognizing the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky's protocol. See Brief for Criminal

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[3]The plurality deems medical standards irrelevant in part because "drawn from a different context." *Ante*, at 60. Medical professionals monitor blood pressure and heart rate, however, not just to save lives, but also to reduce the risk of consciousness during otherwise painful procedures. Considering that the constitutionality of Kentucky's protocol depends on guarding against the same risk, see *supra*, at 114; *ante*, at 53–54 (plurality opinion), the plurality's reluctance to consider medical practice is puzzling. No one is advocating the wholesale incorporation of medical standards into the Eighth Amendment. But Kentucky could easily monitor the inmate's blood pressure and heart rate without physician involvement. That medical professionals consider such monitoring important enough to make it the standard of care in medical practice, I remain persuaded, is highly instructive.

[4]Petitioners' expert testified that a layperson could not tell from visual observation if a paralyzed inmate was conscious and that doing so would be difficult even for a professional. App. 418. Kentucky's warden candidly admitted: "I honestly don't know what you'd look for." *Id.*, at 283.

Justice Legal Foundation as *Amicus Curiae* 19–23.[5] Florida pauses between injection of the first and second drugs so the warden can "determine, after consultation, that the inmate is indeed unconscious." *Lightbourne* v. *McCollum*, 969 So. 2d 326, 346 (Fla. 2007) *(per curiam)* (internal quotation marks omitted). The warden does so by touching the inmate's eyelashes, calling his name, and shaking him. *Id.*, at 347.[6] If the inmate's consciousness remains in doubt in Florida, "the medical team members will come out from the chemical room and consult in the assessment of the inmate." *Ibid.* During the entire execution, the person who inserted the IV line monitors the IV access point and the inmate's face on closed-circuit television. *Ibid.*

In Missouri, "medical personnel must examine the prisoner physically to confirm that he is unconscious using standard clinical techniques and must inspect the catheter site again." *Taylor* v. *Crawford*, 487 F. 3d 1072, 1083 (CA8 2007). "The second and third chemicals are injected only after confirmation that the prisoner is unconscious and after a period of at least three minutes has elapsed from the first injection of thiopental." *Ibid.*

In California, a member of the IV team brushes the inmate's eyelashes, speaks to him, and shakes him at the half-

[5] Because most death penalty States keep their protocols secret, a comprehensive survey of other States' practices is not available. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 6–12.

[6] Florida's expert in *Lightbourne* v. *McCollum*, 969 So. 2d 326 (Fla. 2007) *(per curiam)*, who also served as Kentucky's expert in this case, testified that the eyelash test is "probably the most common first assessment that we use in the operating room to determine . . . when a patient might have crossed the line from being conscious to unconscious." 4 Tr. in *State* v. *Lightbourne*, No. 81–170–CF (Fla. Cir. Ct., Marion Cty.), p. 511, online at http://www.cjlf.org/files/LightbourneRecord.pdf (all Internet materials as visited Apr. 14, 2008, and in Clerk of Court's case file). "A conscious person, if you touch their eyelashes very lightly, will blink; an unconscious person typically will not." *Ibid.* The shaking and name-calling tests, he further testified, are similar to those taught in basic life support courses. See *id.*, at 512.

way point and, again, at the completion of the sodium thiopental injection. See State of California, San Quentin Operational Procedure No. 0–770, Execution by Lethal Injection, § V(S)(4)(e) (2007), online at http://www.cdcr.ca.gov/News/docs/RevisedProtocol.pdf.

In Alabama, a member of the execution team "begin[s] by saying the condemned inmate's name. If there is no response, the team member will gently stroke the condemned inmate's eyelashes. If there is no response, the team member will then pinch the condemned inmate's arm." Respondents' Opposition to Callahan's Application for a Stay of Execution in *Callahan* v. *Allen*, O. T. 2007, No. 07A630, p. 3 (internal quotation marks omitted).

In Indiana, officials inspect the injection site after administration of sodium thiopental, say the inmate's name, touch him, and use ammonia tablets to test his response to a noxious nasal stimulus. See Tr. of Preliminary Injunction Hearing in 1:06–cv–1859 (SD Ind.), pp. 199–200, online at http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/Public/MoralesTaylorAmicus/20.pdf (hereinafter Timberlake Hearing).[7]

These checks provide a degree of assurance—missing from Kentucky's protocol—that the first drug has been properly administered. They are simple and essentially costless to employ, yet work to lower the risk that the inmate will be subjected to the agony of conscious suffocation caused by pancuronium bromide and the searing pain caused by potassium chloride. The record contains no explanation why Kentucky does not take any of these elementary measures.

The risk that an error administering sodium thiopental would go undetected is minimal, Kentucky urges, because if the drug was mistakenly injected into the inmate's tissue, not a vein, he "would be awake and screaming." Tr. of Oral Arg. 30–31. See also Brief for Respondents 42; Brief for

[7] In Indiana, a physician also examines the inmate after injection of the first drug. Timberlake Hearing 199.

State of Texas et al. as *Amici Curiae* 26–27. That argument ignores aspects of Kentucky's protocol that render passive reliance on obvious signs of consciousness, such as screaming, inadequate to determine whether the inmate is experiencing pain.

First, Kentucky's use of pancuronium bromide to paralyze the inmate means he will not be able to scream after the second drug is injected, no matter how much pain he is experiencing. Kentucky's argument, therefore, appears to rest on the assertion that sodium thiopental is itself painful when injected into tissue rather than a vein. See App. 601. The trial court made no finding on that point, and Kentucky cites no supporting evidence from executions in which it is known that sodium thiopental was injected into the inmate's soft tissue. See, *e. g.*, *Lightbourne*, 969 So. 2d, at 344 (describing execution of Angel Diaz).

Second, the inmate may receive enough sodium thiopental to mask the most obvious signs of consciousness without receiving a dose sufficient to achieve a surgical plane of anesthesia. See 7 Tr. 976 (Apr. 21, 2005). If the drug is injected too quickly, the increase in blood pressure can cause the inmate's veins to burst after a small amount of sodium thiopental has been administered. Cf. App. 217 (describing risk of "blowout"). Kentucky's protocol does not specify the rate at which sodium thiopental should be injected. The executioner, who does not have any medical training, pushes the drug "by feel" through five feet of tubing. *Id.*, at 284, 286–287.[8] In practice sessions, unlike in an actual execution, there is no resistance on the catheter, see *id.*, at 285; thus the executioner's training may lead him to push the drugs too fast.

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[8]The length of the tubing contributes to the risk that the inmate will receive an inadequate dose of sodium thiopental. The warden and deputy warden watch for obvious leaks in the execution chamber, see *ante*, at 45–46 (plurality opinion), but the line also snakes into the neighboring control room through a small hole in the wall, App. 280.

"The easiest and most obvious way to ensure that an inmate is unconscious during an execution," petitioners argued to the Kentucky Supreme Court, "is to check for consciousness prior to injecting pancuronium [bromide]." Brief for Appellants in No. 2005–SC–00543, p. 41. See also App. 30, ¶105(j) (Complaint) (alleging Kentucky's protocol does not "require the execution team to determine that the condemned inmate is unconscious prior to administering the second and third chemicals"). The court did not address petitioners' argument. I would therefore remand with instructions to consider whether the failure to include readily available safeguards to confirm that the inmate is unconscious after injection of sodium thiopental, in combination with the other elements of Kentucky's protocol, creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain.

Syllabus

BURGESS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06–11429. Argued March 24, 2008—Decided April 16, 2008

The Controlled Substances Act (CSA) doubles the mandatory minimum sentence for certain federal drug crimes if the defendant was previously convicted of a "felony drug offense." 21 U. S. C. §841(b)(1)(A). Section 802(13) defines the unadorned term "felony" to mean any "offense classified by applicable Federal or State law as a felony," while §802(44) defines the compound term "felony drug offense" to "mea[n] an offense [involving specified drugs] that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country."

Petitioner Burgess pleaded guilty in federal court to conspiracy to possess with intent to distribute 50 grams or more of cocaine base, an offense that ordinarily carries a ten-year mandatory minimum sentence. Burgess had a prior South Carolina cocaine possession conviction, which carried a maximum sentence of two years but was classified as a misdemeanor under state law. The Federal Government argued that Burgess' minimum federal sentence should be enhanced to 20 years under §841(b)(1)(A) because his South Carolina conviction was punishable by more than one year's imprisonment. Burgess countered that because "felony drug offense" incorporates the term "felony," a word separately defined in §802(13), a prior drug offense does not warrant an enhanced §841(b)(1)(A) sentence unless it is both (1) classified as a felony under the law of the punishing jurisdiction, per §802(13); and (2) punishable by more than one year's imprisonment, per §802(44). Rejecting that argument, the District Court ruled that §802(44) alone controls the meaning of "felony drug offense" under §841(b)(1)(A). The Fourth Circuit affirmed.

Held: Because the term "felony drug offense" in §841(b)(1)(A) is defined exclusively by §802(44) and does not incorporate §802(13)'s definition of "felony," a state drug offense punishable by more than one year qualifies as a "felony drug offense," even if state law classifies the offense as a misdemeanor. Pp. 129–136.

(a) The CSA's language and structure indicate that Congress used "felony drug offense" as a term of art defined by §802(44) without reference to §802(13). First, a definition such as §802(44)'s that declares what a term "means" generally excludes any meaning that is not stated.

Syllabus

E. g., *Colautti* v. *Franklin*, 439 U. S. 379, 392–393, n. 10. Second, because "felony" is commonly defined to mean a crime punishable by imprisonment for more than one year, see, *e. g.*, 18 U. S. C. §3559(a), §802(44)'s definition of "felony drug offense" as "an offense . . . punishable by imprisonment for more than one year" leaves no blank for §802(13) to fill. Third, if Congress wanted "felony drug offense" to incorporate §802(13)'s definition of "felony," it easily could have written §802(44) to state: "The term 'felony drug offense' means a *felony* that is punishable by imprisonment for more than one year . . . ." Fourth, the Court's reading avoids anomalies that would arise if both §802(13) and §802(44) governed application of §841(b)(1)(A)'s sentencing enhancement. Section 802(13) includes only federal and state offenses and would exclude enhancement based on a foreign offense, notwithstanding the express inclusion of foreign offenses in §841(b)(1)(A). Furthermore, Burgess' compound definition of "felony drug offense" leaves unanswered the appropriate classification of drug convictions in state and foreign jurisdictions that do not label offenses as felonies or misdemeanors. Finally, the Court's reading of §802(44) hardly renders §802(13) extraneous; the latter section serves to define "felony" for the many CSA provisions using that unadorned term. Pp. 129–133.

(b) The CSA's drafting history reinforces the Court's reading. In 1988, Congress first defined "felony drug offense" as, *inter alia*, "an offense that is a *felony* under . . . any law of a State" (emphasis added), but, in 1994, it amended the statutory definition to its present form. By recognizing §802(44) as the exclusive definition of "felony drug offense," the Court's reading serves an evident purpose of the 1994 revision: to eliminate disparities resulting from divergent state classifications of offenses by adopting a uniform federal standard based on the authorized term of imprisonment. By contrast, Burgess' reading of the 1994 alteration as merely adding a length-of-imprisonment requirement to a definition already requiring designation of an offense as a felony by the punishing jurisdiction would attribute to the amendment little practical effect and encounters formidable impediments: the statute's text and history. Pp. 133–135.

(c) Burgess' argument that the rule of lenity should be applied in determining whether "felony drug offense" incorporates §802(13)'s definition of "felony" is rejected. The touchstone of the rule of lenity is statutory ambiguity. *E. g.*, *Bifulco* v. *United States*, 447 U. S. 381, 387. Because Congress expressly defined "felony drug offense" in a manner that is coherent, complete, and by all signs exclusive, there is no ambiguity for the rule of lenity to resolve here. P. 135.

478 F. 3d 658, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court.

Jeffrey L. Fisher, by appointment of the Court, 552 U. S. 1138, argued the cause for petitioner. With him on the briefs were *Pamela S. Karlan*, *Amy Howe*, *Kevin K. Russell*, *Laurence H. Tribe*, and *Thomas C. Goldstein*.

Nicole A. Saharsky argued the cause for the United States. With her on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Daniel S. Goodman*.*

JUSTICE GINSBURG delivered the opinion of the Court.

For certain federal drug offenses, the Controlled Substances Act mandates a minimum sentence of imprisonment for ten years. 21 U. S. C. §841(b)(1)(A). That minimum doubles to 20 years for defendants previously convicted of a "felony drug offense." *Ibid.* The question in this case is whether a state drug offense classified as a misdemeanor, but punishable by more than one year's imprisonment, is a "felony drug offense" as that term is used in §841(b)(1)(A).

Two statutory definitions figure in our decision. Section 802(13) defines the unadorned term "felony" to mean any "offense classified by applicable Federal or State law as a felony." Section 802(44) defines the compound term "felony drug offense" to mean an offense involving specified drugs that is "punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country."

The term "felony drug offense" contained in §841(b)(1)(A)'s provision for a 20-year minimum sentence, we hold, is defined exclusively by §802(44) and does not incorporate §802(13)'s definition of "felony." A state drug offense punishable by more than one year therefore qualifies as a "felony drug

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Kevin B. Huff, *Peter Goldberger*, *Pamela Harris*, and *Mary Price* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

offense," even if state law classifies the offense as a misdemeanor.

I

Petitioner Keith Lavon Burgess pleaded guilty in the United States District Court for the District of South Carolina to conspiracy to possess with intent to distribute 50 grams or more of cocaine base in violation of 21 U. S. C. §§841(a) and 846.[1] A violation of §841(a) involving that quantity of cocaine base ordinarily carries a mandatory minimum sentence of ten years. §841(b)(1)(A). The minimum sentence increases to 20 years, however, if the crime follows a prior conviction for a "felony drug offense." *Ibid.*

Burgess had previously been convicted of possessing cocaine in violation of S. C. Code Ann. §44–53–370(c) and (d)(1) (2002 and Supp. 2007). Although that offense carried a maximum sentence of two years' imprisonment, South Carolina classified it as a misdemeanor. §44–53–370(d)(1). Burgess' prior South Carolina conviction, the Government urged, raised the minimum sentence for his federal conviction to 20 years. The enhancement was mandatory, the Government maintained, because Congress defined "felony drug offense" to include state cocaine offenses "punishable by imprisonment for more than one year." 21 U. S. C. §802(44).[2]

Burgess contested the enhancement of his federal sentence. The term "felony drug offense," he argued, incorporates the term "felony," a word separately defined in §802(13) to mean "any Federal or State offense classified by

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[1] Although Title 21 of the United States Code has not been enacted as positive law, we refer to it rather than the underlying provisions of the Controlled Substances Act, 84 Stat. 1242, as amended, 21 U. S. C. §801 *et seq.*, for the sake of simplicity. The relevant provisions of Title 21 have not changed from the time of Burgess' offense, and all citations are to the 2000 edition through Supplement V.

[2] Burgess received a one-year suspended sentence for his South Carolina conviction, but does not dispute that the offense was "*punishable* by imprisonment for more than one year." §802(44) (emphasis added).

applicable Federal or State law as a felony." A prior drug offense does not rank as a "felony drug offense," he contended, unless it is (1) classified as a felony under the law of the punishing jurisdiction, per § 802(13); and (2) punishable by more than one year's imprisonment, per § 802(44).

Rejecting Burgess' argument, the District Court ruled that § 802(44) alone controls the meaning of "felony drug offense" as that term is used in § 841(b)(1)(A). Although the District Court's ruling subjected Burgess to a 20-year minimum sentence, the Government moved for a downward departure based on Burgess' substantial assistance in another prosecution. See 18 U. S. C. § 3553(e) (2000 ed., Supp. V). The court granted the motion and sentenced Burgess to 156 months' imprisonment followed by ten years' supervised release.

The United States Court of Appeals for the Fourth Circuit affirmed. The "'commonsense way to interpret "felony drug offense,"'" that court said, "'is by reference to the definition in § 802(44).'" 478 F. 3d 658, 662 (2007) (quoting *United States* v. *Roberson*, 459 F. 3d 39, 52 (CA1 2006)). The Fourth Circuit found nothing in the "plain language or statutory scheme . . . to indicate that Congress intended 'felony drug offense' also to incorporate the definition [of 'felony'] in § 802(13)." 478 F. 3d, at 662.

Burgess, proceeding *pro se*, petitioned for a writ of certiorari. We granted the writ, 552 U. S. 1074 (2007), to resolve a split among the Circuits on the question Burgess presents: Does a drug crime classified as a misdemeanor by state law, but punishable by more than one year's imprisonment, rank as a "felony drug offense" under 21 U. S. C. § 841(b)(1)(A)? Compare 478 F. 3d 658 (case below) and *Roberson*, 459 F. 3d 39 (§ 802(44) provides exclusive definition of "felony drug offense"), with *United States* v. *West*, 393 F. 3d 1302 (CADC 2005) (both § 802(13) and § 802(44) limit meaning of "felony drug offense").

II

A

The Controlled Substances Act (CSA), 21 U. S. C. § 801 *et seq.*, contains two definitions central to the dispute before us; they bear repetition in full. Section 802(13) provides:

> "The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony."

Section 802(44) states:

> "The term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances."

Burgess argues here, as he did below, that "felony drug offense," as used in § 841(b)(1)(A), should be construed to incorporate both the definition of "felony" in § 802(13) and the definition of "felony drug offense" in § 802(44). Under his reading, the § 841(b)(1)(A) enhancement is triggered only when the prior conviction is both "classified by applicable Federal or State law as a felony," § 802(13), and "punishable by imprisonment for more than one year," § 802(44).

The Government, in contrast, reads § 802(44) to provide the exclusive definition of "felony drug offense." Under the Government's reading, all defendants whose prior drug crimes were punishable by more than one year in prison would be subject to the § 841(b)(1)(A) enhancement, regardless of the punishing jurisdiction's classification of the offense.

The Government's reading, we are convinced, correctly interprets the statutory text and context. Section 802(44) defines the precise phrase used in § 841(b)(1)(A)—"felony drug offense." "Statutory definitions control the meaning of statutory words . . . in the usual case." *Lawson* v. *Suwannee*

Fruit & S. S. Co., 336 U. S. 198, 201 (1949). See also *Stenberg* v. *Carhart*, 530 U. S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition . . . ."); 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47:7, pp. 298–299, and nn. 2–3 (7th ed. 2007) (hereinafter Singer).

The CSA, to be sure, also defines the term "felony." The language and structure of the statute, however, indicate that Congress used the phrase "felony drug offense" as a term of art defined by § 802(44) without reference to § 802(13). First, Congress stated that "[t]he term 'felony drug offense' *means* an offense that is punishable by imprisonment for more than one year." § 802(44) (emphasis added). "As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Colautti* v. *Franklin*, 439 U. S. 379, 392–393, n. 10 (1979) (some internal quotation marks omitted). See also *Groman* v. *Commissioner*, 302 U. S. 82, 86 (1937); 2A Singer § 47:7, p. 306, and n. 20.

Second, the term "felony" is commonly defined to mean a crime punishable by imprisonment for more than one year. See, *e. g.*, 18 U. S. C. § 3559(a) (classifying crimes with a maximum term of more than one year as felonies); Black's Law Dictionary 651 (8th ed. 2004) (defining "felony" as "[a] serious crime usu[ally] punishable by imprisonment for more than one year or by death"). Section 802(44)'s definition of "felony drug offense" as "an offense . . . punishable by imprisonment for more than one year," in short, leaves no blank to be filled by § 802(13) or any other definition of "felony."

Third, if Congress wanted "felony drug offense" to incorporate the definition of "felony" in § 802(13), it easily could have written § 802(44) to state: "The term 'felony drug offense' means a *felony* that is punishable by imprisonment for more than one year . . . ." See *Roberson*, 459 F. 3d, at 52. Congress has often used that drafting technique—*i. e.*, re-

peating a discretely defined word—when it intends to incorporate the definition of a particular word into the definition of a compound expression. See, *e. g.*, 15 U. S. C. § 1672(a)–(b) (defining "earnings" and then defining "disposable earnings" as "that part of the earnings" meeting certain criteria); 18 U. S. C. § 1956(c)(3)–(4) (defining "transaction" and then defining "financial transaction" as "a transaction which" meets other criteria); § 1961(1), (5) (2000 ed. and Supp. V) (defining "racketeering activity" and then defining "pattern of racketeering activity" to require "at least two acts of racketeering activity").[3]

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[3] Burgess offers four examples of defined words nested within defined phrases where, he asserts, the definition of the word is embraced within the phrase, although the word is not repeated in the definition of the phrase. See Reply Brief 11–12; Tr. of Oral Arg. 6, 11–12. In all but one of these examples, however, the definition of the phrase is introduced by the word "includes." See 2 U. S. C. § 1301(4), (6), (7); 18 U. S. C. § 2266(3)–(4). "[T]he word 'includes' is usually a term of enlargement, and not of limitation." 2A Singer § 47:7, p. 305 (some internal quotation marks omitted). Thus "[a] term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning . . . than where"—as in § 802(44)—"the definition declares what a term 'means.'" *Ibid.* See also *Groman* v. *Commissioner*, 302 U. S. 82, 86 (1937) ("[W]hen an exclusive definition is intended the word 'means' is employed, . . . whereas here the word used is 'includes.'").

Burgess' fourth example is also inapposite. The definition of "debtor's principal residence" in the Bankruptcy Code, he notes, does not repeat the word "debtor," itself a discretely defined term. See 11 U. S. C. § 101(13), (13A) (2000 ed., Supp. V). Section 101(13A) states: "The term 'debtor's principal residence'—(A) means a residential structure, including incidental property, without regard to whether that structure is attached to real property; and (B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer." That definition, unlike 21 U. S. C. § 802(44), is incomplete on its face because nothing in the definition of "debtor's principal residence" elucidates the word "debtor's." Given that void and 11 U. S. C. § 101(13A)'s placement in the Bankruptcy Code, it is reasonable to assume that Congress wanted courts to read the phrase "debtor's principal residence" in light of the separate definition of

Fourth, our reading avoids anomalies that would arise if both 21 U. S. C. §802(13) and §802(44) governed application of the sentencing enhancement in §841(b)(1)(A). Notably, §802(44) includes foreign offenses punishable by more than one year, while §802(13) includes only federal and state offenses. Incorporation of §802(13) into §841(b)(1)(A) would exclude enhancement based on a foreign offense, notwithstanding the express inclusion of foreign offenses in §802(44)'s definition of "felony drug offense." Furthermore, some States and many foreign jurisdictions do not label offenses as felonies or misdemeanors. See N. J. Stat. Ann. §2C:1–4 (West 2005); Me. Rev. Stat. Ann., Tit. 17–A, §1252 (Supp. 2007); Brief for United States 35. Burgess' compound definition of "felony drug offense" leaves unanswered the appropriate classification of drug convictions in those jurisdictions. See, *e. g.*, *United States* v. *Brown*, 937 F. 2d 68, 70 (CA2 1991) (relying on New Jersey common law to determine that the State classifies offenses punishable by more than one year as felonies). No such uncertainty arises under the precise definition Congress provided in §802(44).

Finally, reading §802(44) as the exclusive definition of "felony drug offense" hardly renders §802(13) extraneous. Section 802(13) serves to define "felony" for many CSA provisions using that unadorned term. See, *e. g.*, §§824(a)(2) (revocation of license to manufacture controlled substances upon conviction of a felony), 843(b) (use of a communication facility to commit a felony), 843(d)(1)–(2) (sentencing enhancements), 843(e) (prohibition on engaging in transactions

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"debtor." Indeed, a contrary reading would yield the absurd result that *every* residential structure is a "debtor's principal residence."

At most, therefore, Burgess' fourth example illustrates the importance of considering context in applying canons of statutory construction. There may well be other examples lurking in the United States Code of nested terms that draw their meaning from two different statutory provisions without repeating one term in the definition of the other. But "felony drug offense" is not among them.

involving listed chemicals upon conviction of a felony involving those chemicals), 848(c)(1) (definition of "continuing criminal enterprise"), 848(e)(1)(B) (mandatory minimum term for killing a law enforcement officer to avoid prosecution for a felony), 853(d) (rebuttable presumption that property acquired during commission of certain felonies is subject to criminal forfeiture), 878(a)(3) (authority to make warrantless arrest where there is probable cause to believe a felony has been committed).

B

The drafting history of the CSA reinforces our reading of § 802(44) as the exclusive definition of "felony drug offense." In 1988, Congress first used the term "felony drug offense" to describe the type of prior conviction that would trigger a 20-year mandatory minimum sentence under § 841(b)(1)(A). See National Narcotics Leadership Act, Pub. L. 100–690, § 6452(a), 102 Stat. 4371. The 1988 definition of the term was placed within § 841(b)(1)(A) itself; the definition covered "an offense that is a felony under any . . . Federal law . . . or . . . any law of a State or a foreign country" prohibiting or restricting conduct relating to certain types of drugs. § 6452(a)(2), *ibid.*[4] But in 1994, Congress amended the definition, replacing "an offense that is a *felony* under . . . any law of a State," *ibid.* (emphasis added), with "an offense that is *punishable by imprisonment for more than one year* under any law . . . of a State," Violent Crime Control and Law Enforcement Act, Pub. L. 103–322, § 90105(c)–(d), 108

[4] The full definition stated:

"For purposes of this subparagraph, the term 'felony drug offense' means an offense that is a felony under any provision of this title or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances." National Narcotics Leadership Act of 1988, Pub. L. 100–690, § 6452(a)(2), 102 Stat. 4371.

Stat. 1988 (emphasis added). In lieu of incorporation within § 841(b)(1)(A), the new definition was placed in a discrete § 802 definition section. *Ibid.*

This alteration lends considerable support to our reading of the statute. Before 1994, the definition of "felony drug offense" depended on the vagaries of state-law classifications of offenses as felonies or misdemeanors. The 1994 amendments replaced that definition with a uniform federal standard based on the authorized length of imprisonment. By recognizing § 802(44) as the exclusive definition of "felony drug offense," our reading serves an evident purpose of the 1994 revision: to bring a measure of uniformity to the application of § 841(b)(1)(A) by eliminating disparities based on divergent state classifications of offenses.

By contrast, Burgess reads the 1994 alteration as merely adding a length-of-imprisonment requirement to a definition that already required—and, he contends, continues to require—designation of an offense as a felony by the punishing jurisdiction. That view, however, is difficult to square with Congress' deletion of the word "felony" and substitution of the phrase "punishable by imprisonment for more than one year."

If Burgess were correct, moreover, the sole effect of the 1994 change would have been to exclude from the compass of § 841(b)(1)(A) the few drug offenses classified as felonies under the law of the punishing jurisdiction but subject to a sentence of one year or less. See Tr. of Oral Arg. 6–8.[5] See also Brief for Petitioner 15 (purpose of 1994 alteration was to eliminate enhancement for "truly minor offenses" nonetheless classified as felonies). Burgess concedes that under

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[5]The examples provided by Burgess of such atypical categorization, Brief for Petitioner 22, all carry maximum sentences of exactly one year. See Ariz. Rev. Stat. Ann. §§ 13–701(C)(5) (West 2001), 13–3405(B)(1) (West Supp. 2007); Ohio Rev. Code Ann. §§ 2925.11(C) (Lexis 2007 Cum. Supp.), 2929.14(A)(5) (Lexis Supp. 2007); N. C. Gen. Stat. Ann. §§ 15A–1340.17, 90–95(d) (Lexis 2007).

his reading of the statute "the language that Congress added [in 1994] has very little practical effect," but defends his interpretation on the ground that Congress labeled the changes "conforming amendments." Tr. of Oral Arg. 8. See also 108 Stat. 1987; Brief for Petitioner 12.

Burgess places more weight on the "Conforming Amendments" caption than it can bear. Congress did not disavow any intent to make substantive changes; rather, the amendments were "conforming" because they harmonized sentencing provisions in the CSA and the Controlled Substances Import and Export Act, 84 Stat. 1285, 21 U. S. C. §951 *et seq.* Treating the amendments as nonsubstantive would be inconsistent with their text, not to mention Burgess' own view that §802(44) added a new length-of-imprisonment requirement to the definition of "felony drug offense."

In sum, the 1994 alteration replaced a patchwork of state and foreign classifications with a uniform federal standard based on the authorized term of imprisonment. Burgess' argument that Congress added something—the definition now in §802(44)—but subtracted nothing encounters formidable impediments: the text and history of the statute.

C

Burgess urges us to apply the rule of lenity in determining whether the term "felony drug offense" incorporates §802(13)'s definition of "felony." "[T]he touchstone of the rule of lenity is statutory ambiguity." *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980) (internal quotation marks omitted). "The rule comes into operation at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U. S. 587, 596 (1961), and "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute," *United States* v. *Shabani*, 513 U. S. 10, 17 (1994). Here, Congress expressly defined the term "felony drug offense." The definition is coherent, complete, and by all signs exclusive.

Accordingly, there is no ambiguity for the rule of lenity to resolve.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

Syllabus

BEGAY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 06–11543. Argued January 15, 2008—Decided April 16, 2008

The Armed Career Criminal Act (Act) imposes a special mandatory 15-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior convictions for committing certain drug crimes or "a violent felony." 18 U. S. C. §924(e)(1). The Act defines "violent felony" as, *inter alia*, a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B)(ii) (hereinafter clause (ii)). After petitioner Begay pleaded guilty to felony possession of a firearm, his presentence report revealed he had 12 New Mexico convictions for driving under the influence of alcohol (DUI), which state law makes a felony (punishable by a prison term of more than one year) the fourth (or subsequent) time an individual commits it. Based on these convictions, the sentencing judge concluded that Begay had three or more "violent felony" convictions and, therefore, sentenced him to an enhanced 15-year sentence. The Tenth Circuit rejected Begay's claim that DUI is not a "violent felony" under the Act.

Held: New Mexico's felony DUI crime falls outside the scope of the Act's clause (ii) "violent felony" definition. Pp. 141–148.

(a) Whether a crime is a violent felony is determined by how the law defines it and not how an individual offender might have committed it on a particular occasion. Pp. 141–142.

(b) Even assuming that DUI involves conduct that "presents a serious potential risk of physical injury to another" under clause (ii), the crime falls outside the clause's scope because it is simply too unlike clause (ii)'s example crimes to indicate that Congress intended that provision to cover it. Pp. 142–148.

(i) Clause (ii)'s listed examples—burglary, arson, extortion, and crimes involving the use of explosives—should be read as limiting the crimes the clause covers to those that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves. Their presence in the statute indicates that Congress meant for the statute to cover only *similar* crimes, rather than *every* crime that "presents a serious potential risk of physical injury to another," §924(e)(2)(B)(ii).

Syllabus

If Congress meant the statute to be all encompassing, it would not have needed to include the examples at all. Moreover, if clause (ii) were meant to include *all* risky crimes, Congress likely would not have included clause (i), which includes crimes that have "as an element the use, attempted use, or threatened use of physical force against the person of another." And had Congress included the examples solely for quantitative purposes, demonstrating no more than the degree of risk of physical injury sufficient to bring a crime within the statute's scope, it would likely have chosen examples that better illustrated the degree of risk it had in mind rather than these that are far from clear in respect to the degree of risk each poses. The Government's argument that the word "otherwise" just after the examples is sufficient to demonstrate that they do not limit the clause's scope is rejected because "otherwise" can refer to a crime that is, *e. g.*, similar to the examples in respect to the degree of risk it produces, but different in respect to the way or manner in which it produces that risk. Pp. 142–144.

(ii) DUI differs from the example crimes in at least one important respect: The examples typically involve purposeful, violent, and aggressive conduct, whereas DUI statutes typically do not. When viewed in terms of the Act's purposes, this distinction matters considerably. The Act looks to past crimes to determine which offenders create a special danger by possessing a gun. In this respect, a history of crimes involving purposeful, violent, and aggressive conduct, which shows an increased likelihood that the offender is the kind of person who might deliberately point a gun and pull the trigger, is different from a history of DUI, which does not involve the deliberate kind of behavior associated with violent criminal use of firearms. Pp. 144–148.

470 F. 3d 964, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 148. ALITO, J., filed a dissenting opinion, in which SOUTER and THOMAS, JJ., joined, *post*, p. 155.

Margaret A. Katze argued the cause for petitioner. With her on the briefs were *Stephen P. McCue* and *Charles McCormack*.

Leondra R. Kruger argued the cause for the United States. With her on the brief were *Solicitor General Clem-*

ent, Assistant Attorney General Fisher, Deputy Solicitor General Dreeben, and *Richard A. Friedman.**

JUSTICE BREYER delivered the opinion of the Court.

The Armed Career Criminal Act imposes a special mandatory 15-year prison term upon felons who unlawfully possess a firearm and who also have three or more previous convictions for committing certain drug crimes or "violent felon[ies]." 18 U. S. C. §924(e)(1) (2000 ed., Supp. V). The question in this case is whether driving under the influence of alcohol is a "violent felony" as the Act defines it. We conclude that it is not.

I

A

Federal law prohibits a previously convicted felon from possessing a firearm. §922(g)(1) (2000 ed.). A related provision provides for a prison term of up to 10 years for an ordinary offender. §924(a)(2). The Armed Career Criminal Act imposes a more stringent 15-year mandatory minimum sentence on an offender who has three prior convictions "for a violent felony or a serious drug offense." §924(e)(1) (2000 ed., Supp. V).

The Act defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that

> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

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*Briefs of *amici curiae* urging reversal were filed for Families Against Mandatory Minimums Foundation by *Mary Price* and *Scott L. Winkelman;* and for the National Association of Federal Defenders by *Jeffrey T. Green, Ileana M. Ciobanu, Matthew J. Warren, Robert N. Hochman, Carlos A. Williams, Frances H. Pratt, Amy Baron-Evans,* and *William Maynard.*

Barbara E. Bergman and *Peter Goldberger* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

> "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B) (2000 ed.).

We here consider whether driving under the influence of alcohol (DUI), as set forth in New Mexico's criminal statutes, falls within the scope of the second clause.

B

The relevant background circumstances include the following: In September 2004, New Mexico police officers received a report that Larry Begay, the petitioner here, had threatened his sister and aunt with a rifle. The police arrested him. Begay subsequently conceded he was a felon and pleaded guilty to a federal charge of unlawful possession of a firearm in violation of §922(g)(1). Begay's presentence report said that he had been convicted a dozen times for DUI, which under New Mexico's law becomes a felony (punishable by a prison term of more than one year) the fourth (or subsequent) time an individual commits it. See N. M. Stat. Ann. §§66–8–102(G) to (J) (Supp. 2007). The sentencing judge consequently found that Begay had at least three prior convictions for a crime "punishable by imprisonment for a term exceeding one year." 377 F. Supp. 2d 1141, 1143 (NM 2005). The judge also concluded that Begay's "three felony DUI convictions involve conduct that presents a serious potential risk of physical injury to another." *Id.*, at 1145. The judge consequently concluded that Begay had three or more prior convictions for a "violent felony" and should receive a sentence that reflected a mandatory minimum prison term of 15 years. *Ibid.*

Begay, claiming that DUI is not a "violent felony" within the terms of the statute, appealed. The Court of Appeals panel by a vote of 2 to 1 rejected that claim. 470 F. 3d 964 (CA10 2006). Begay sought certiorari, and we agreed to decide the question.

II

A

New Mexico's DUI statute makes it a crime (and a felony after three earlier convictions) to "drive a vehicle within [the] state" if the driver "is under the influence of intoxicating liquor" (or has an alcohol concentration of .08 or more in his blood or breath within three hours of having driven the vehicle resulting from "alcohol consumed before or while driving the vehicle"). §§66–8–102(A), (C). In determining whether this crime is a violent felony, we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion. See *Taylor* v. *United States*, 495 U. S. 575, 602 (1990) (adopting this "categorical approach"); see also *James* v. *United States*, 550 U. S. 192, 208–209 (2007) (attempted burglary is a violent felony even if, on *some* occasions, it can be committed in a way that poses no serious risk of physical harm).

We also take as a given that DUI does not fall within the scope of the Act's *clause (i)* "violent felony" definition. DUI, as New Mexico defines it, nowhere "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U. S. C. §924(e)(2)(B)(i).

Finally, we assume that the lower courts were right in concluding that DUI involves conduct that "presents a serious potential risk of physical injury to another." §924(e)(2)(B)(ii). Drunk driving is an extremely dangerous crime. In the United States in 2006, alcohol-related motor vehicle crashes claimed the lives of more than 17,000 individuals and harmed untold amounts of property. National Highway Traffic Safety Admin., Traffic Safety Facts, 2006 Traffic Safety Annual Assessment—Alcohol-Related Fatalities 1 (No. 810821, Aug. 2007), http://www-nrd.nhtsa.dot.gov/Pubs/810821.PDF (as visited Apr. 11, 2008, and available in

Clerk of Court's case file). Even so, we find that DUI falls outside the scope of clause (ii). It is simply too unlike the provision's listed examples for us to believe that Congress intended the provision to cover it.

B

1

In our view, the provision's listed examples—burglary, arson, extortion, or crimes involving the use of explosives—illustrate the kinds of crimes that fall within the statute's scope. Their presence indicates that the statute covers only *similar* crimes, rather than *every* crime that "presents a serious potential risk of physical injury to another." §924(e)(2)(B)(ii). If Congress meant the latter, *i. e.*, if it meant the statute to be all encompassing, it is hard to see why it would have needed to include the examples at all. Without them, clause (ii) would cover *all* crimes that present a "serious potential risk of physical injury." *Ibid.* Additionally, if Congress meant clause (ii) to include *all* risky crimes, why would it have included clause (i)? A crime which has as an element the "use, attempted use, or threatened use of physical force" against the person (as clause (i) specifies) is likely to create "a serious potential risk of physical injury" and would seem to fall within the scope of clause (ii).

Of course, Congress *might* have included the examples solely for quantitative purposes. Congress might have intended them to demonstrate no more than the degree of risk sufficient to bring a crime within the statute's scope. But were that the case, Congress would have likely chosen examples that better illustrated the "degree of risk" it had in mind. Our recent case, *James* v. *United States*—where we considered only matters of degree, *i. e.*, whether the amount of risk posed by attempted burglary was comparable to the amount of risk posed by the example crime of burglary—illustrates the difficulty of interpreting the examples in this

respect. Compare 550 U. S., at 203–207, with *id.*, at 215, 218–219, 229 (SCALIA, J., dissenting). Indeed, the examples are so far from clear in respect to the degree of risk each poses that it is difficult to accept clarification in respect to degree of risk as Congress' only reason for including them. See *id.*, at 229 ("Congress provided examples [that] . . . have little in common, most especially with respect to the level of risk of physical injury that they pose").

These considerations taken together convince us that, "'to give effect . . . to every clause and word'" of this statute, we should read the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves. *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955); some internal quotation marks omitted); see also *Leocal* v. *Ashcroft*, 543 U. S. 1, 12 (2004) (describing the need to interpret a statute in a way that gives meaning to each word).

The concurrence complains that our interpretive approach is insufficiently specific. See *post*, at 150–151 (SCALIA, J., concurring in judgment). But the concurrence's own approach demands a crime-by-crime analysis, uses a standard of measurement (comparative degree of risk) that even the concurrence admits is often "unclear," *post*, at 151, requires the concurrence to turn here to the still less clear "rule of lenity," *post*, at 153, and, as we explain, is less likely to reflect Congress' intent. See, *e. g.*, *post*, at 153–154 (recognizing inability to measure quantitative seriousness of risks associated with DUI).

The statute's history offers further support for our conclusion that the examples in clause (ii) limit the scope of the clause to crimes that are similar to the examples themselves. Prior to the enactment of the current language, the Act applied its enhanced sentence to offenders with "three previous convictions for robbery or burglary." *Taylor*, *supra*, at 581 (internal quotation marks omitted). Congress sought to

expand that definition to include both crimes against the person (clause (i)) and certain physically risky crimes against property (clause (ii)). See H. R. Rep. No. 99–849, p. 3 (1986) (hereinafter H. R. Rep.). When doing so, Congress rejected a broad proposal that would have covered *every* offense that involved a substantial risk of the use of "'physical force against the person or property of another.'" *Taylor*, 495 U. S., at 583 (quoting S. 2312, 99th Cong., 2d Sess. (1986); H. R. 4639, 99th Cong., 2d Sess. (1986)). Instead, it added the present examples. And in the relevant House Report, it described clause (ii) as including "State and Federal felonies against property such as burglary, arson, extortion, use of explosives and *similar* crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person." H. R. Rep., at 5 (emphasis added).

Of course, the statute places the word "otherwise," just after the examples, so that the provision covers a felony that is one of the example crimes "or *otherwise* involves conduct that presents a serious potential risk of physical injury." §924(e)(2)(B)(ii) (emphasis added). But we cannot agree with the Government that the word "otherwise" is *sufficient* to demonstrate that the examples do not limit the scope of the clause. That is because the word "otherwise" *can* (we do not say *must*, cf. *post*, at 151 (SCALIA, J., concurring in judgment)) refer to a crime that is similar to the listed examples in some respects but different in others—similar, say, in respect to the degree of risk it produces, but different in respect to the "way or manner" in which it produces that risk. Webster's Third New International Dictionary 1598 (1961) (defining "otherwise" to mean "in a different way or manner").

2

In our view, DUI differs from the example crimes—burglary, arson, extortion, and crimes involving the use of explosives—in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, "violent,"

and "aggressive" conduct. 470 F. 3d, at 980 (McConnell, J., dissenting in part); see, *e. g.*, *Taylor*, *supra*, at 598 ("burglary" is an unlawful or unprivileged entry into a building or other structure with "intent to commit a crime"); ALI Model Penal Code §220.1(1) (1985) ("arson" is causing a fire or explosion with "the purpose of," *e. g.*, "destroying a building . . . of another" or "damaging any property . . . to collect insurance"); *id.*, §223.4 (extortion is "purposely" obtaining property of another through threat of, *e. g.*, inflicting "bodily injury"); *Leocal*, *supra*, at 9 (the word "'use' . . . most naturally suggests a higher degree of intent than negligent or merely accidental conduct" which fact helps bring it outside the scope of the statutory term "crime of violence"). That conduct is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim. Crimes committed in such a purposeful, violent, and aggressive manner are "potentially more dangerous when firearms are involved." 470 F. 3d, at 980 (McConnell, J., dissenting in part). And such crimes are "characteristic of the armed career criminal, the eponym of the statute." *Ibid.*

By way of contrast, statutes that forbid driving under the influence, such as the statute before us, typically do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all. The Government argues that "the knowing nature of the conduct that produces intoxication combined with the inherent recklessness of the ensuing conduct more than suffices" to create an element of intent. Brief for United States 35. And we agree with the Government that a drunk driver may very well drink on purpose. But this Court has said that, unlike the example crimes, the conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate. See *Leocal*, *supra*, at 11 (a DUI offense involves "accidental or negligent conduct"); see also

470 F. 3d, at 980 (McConnell, J., dissenting in part) ("[D]runk driving is a crime of negligence or recklessness, rather than violence or aggression").

When viewed in terms of the Act's basic purposes, this distinction matters considerably. As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun. See *Taylor*, *supra*, at 587–588; 470 F. 3d, at 981, n. 3 (McConnell, J., dissenting in part) ("[T]he title [of the Act] was not merely decorative"). In order to determine which offenders fall into this category, the Act looks to past crimes. This is because an offender's criminal history is relevant to the question whether he is a career criminal, or, more precisely, to the kind or degree of danger the offender would pose were he to possess a gun.

In this respect—namely, a prior crime's relevance to the possibility of future danger with a gun—crimes involving intentional or purposeful conduct (as in burglary and arson) are different from DUI, a strict-liability crime. In both instances, the offender's prior crimes reveal a degree of callousness toward risk, but in the former instance they also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist.

Were we to read the statute without this distinction, its 15-year mandatory minimum sentence would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels "armed career criminals." See, *e. g.*, Ark. Code Ann. §8–4–103(a)(2)(A)(ii) (2007) (reckless polluters); 33 U. S. C. §1319(c)(1) (individuals who negligently introduce pollutants into the sewer system); 18 U. S. C. §1365(a) (individuals who recklessly tamper with consumer products); §1115 (seamen whose inattention to

duty causes serious accidents). We have no reason to believe that Congress intended to bring within the statute's scope these kinds of crimes, far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms. The statute's use of examples (and the other considerations we have mentioned) indicate the contrary.

The dissent's approach, on the other hand, would likely include these crimes within the statutory definition of "violent felony," along with any other crime that can be said to present a "'potential risk of physical injury.'" *Post*, at 156 (opinion of ALITO, J.). And it would do so because it believes such a result is compelled by the statute's text. See *post*, at 155. But the dissent's explanation does not account for a key feature of that text—namely, the four example crimes intended to illustrate what kind of "violent felony" the statute covers. The dissent at most believes that these examples are relevant only to define the requisite serious risk associated with a "crime of violence." *Post*, at 158–159. But the dissent does not explain how to identify the requisite level of risk, nor does it describe how these various examples might help determine what other offenses involve conduct presenting the same level of risk. If they were in fact helpful on that score, we might expect more predictable results from a purely risk-based approach. Compare *post*, at 148, 153–154 (SCALIA, J., concurring in judgment), with *post*, at 156–158 (dissenting opinion). Thus, the dissent's reliance on these examples for a function they appear incapable of performing reads them out of the statute and, in so doing, fails to effectuate Congress' purpose to punish only a particular subset of offender, namely, career criminals.

The distinction we make does not minimize the seriousness of the risks attached to driving under the influence. Nor does our argument deny that an individual with a criminal history of DUI might later pull the trigger of a gun. (Indeed, we may have such an instance before us. 470 F. 3d,

at 965.) Rather, we hold only that, for purposes of the particular statutory provision before us, a prior record of DUI, a strict-liability crime, differs from a prior record of violent and aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the use of explosives. The latter are associated with a likelihood of future violent, aggressive, and purposeful "armed career criminal" behavior in a way that the former are not.

We consequently conclude that New Mexico's crime of "driving under the influence" falls outside the scope of the Armed Career Criminal Act's clause (ii) "violent felony" definition. And we reverse the judgment of the Court of Appeals in relevant part and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

The statute in this case defines "violent felony" in part as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. §924(e)(2)(B)(ii). Contrary to the Court, I conclude that the residual clause unambiguously encompasses *all* crimes that present a serious risk of injury to another. But because I cannot say that drunk driving clearly poses such a risk (within the meaning of the statute), the rule of lenity brings me to concur in the judgment of the Court.

I

Last Term, in *James* v. *United States*, 550 U. S. 192 (2007), the Court held that attempted burglary qualifies as a violent felony under §924(e). It concluded that to determine whether a predicate crime falls under the residual clause, a court should first identify the enumerated crime to which the predicate crime is most closely analogous and then decide

whether the risk posed by the predicate crime is roughly equivalent to the risk posed by the enumerated crime. Because burglary was the enumerated crime most closely analogous to attempted burglary, and attempted burglary in the Court's judgment posed roughly the same risk of physical injury as burglary, attempted burglary qualified as a "violent felony" under §924(e). See *id.*, at 209.

Unfortunately, the Court's approach in deciding that case provided no guidance for deciding future cases that involve predicate crimes other than attempted burglary, particularly those for which there are no clear analogs among the enumerated crimes. Pointing out that problem in dissent, I anticipated this very case: "Is, for example, driving under the influence of alcohol more analogous to burglary, arson, extortion, or a crime involving use of explosives?" *Id.*, at 215.

My dissent set out a different approach to the statute. In my view, the best way to interpret §924(e) is first to determine which of the enumerated offenses poses the least serious risk of physical injury, and then to set that level of risk as the "serious potential risk" required by the statute. Crimes that pose at least that serious a risk of injury are encompassed by the residual clause; crimes that do not are excluded. In my judgment, burglary was the least risky crime among the enumerated offenses, and I therefore concluded that attempted burglary, which is less risky than burglary, is not covered by the residual clause.

The Court held otherwise in *James*, and since this is a statutory case that holding has a strong claim to *stare decisis*. But the concomitant of the sad fact that the theory of *James* has very limited application is the happy fact that its *stare decisis* effect is very limited as well. It must be followed, I presume, for unenumerated crimes that are analogous to enumerated crimes (*e. g.*, attempted arson). It provides no answer, and suggests no approach to an answer, where, as here, the predicate crime has no analog among

the enumerated crimes. For such cases I would therefore adhere to the principles I set forth in my *James* dissent.

II

Today the Court devises a different way to give concrete meaning to the residual clause. Confronted with a predicate crime that has no obvious analog among the enumerated offenses, the Court engrafts a requirement onto the residual clause that a predicate crime involve "purposeful, 'violent,' and 'aggressive' conduct." *Ante*, at 144–145. By doing so, it excludes a slew of crimes from the scope of the residual clause, including (not by happenstance) the crime at issue here, drunk driving. Like *James*, this latest made-for-the-case improvisation does not (as my resolution does) provide a complete framework that will embrace all future cases. There are still many crimes that are not analogous to the enumerated crimes (so that their status cannot be resolved by *James*) but do involve "purposeful, 'violent,' and 'aggressive' conduct" (so that their status cannot be resolved by today's *deus ex machina*). Presumably some third (and perhaps fourth and fifth) gimmick will be devised to resolve those cases as they arise, leaving our brethren on the district courts and courts of appeals much room for enjoyable speculation.

But quite apart from its regrettable continuation of a piecemeal, suspenseful, Scrabble-like approach to the interpretation of this statute, the problem with the Court's holding today is that it is not remotely faithful to the statute that Congress wrote. There is simply no basis (other than the necessity of resolving the present case) for holding that the enumerated and unenumerated crimes must be similar in respects *other than the degree of risk that they pose*.

The Court is correct that the clause "otherwise involves conduct that presents a serious potential risk of physical injury to another" signifies a similarity between the enumerated and unenumerated crimes. It is not, however, *any* old

similarity, such as (to take a random example) "purposeful, 'violent,' and 'aggressive' conduct." Rather, it is the *particular* similarity specified after the "otherwise"—*i. e.*, that they all pose a serious potential risk of physical injury to another. They need not be similar in any other way. As the Court correctly notes, the word "otherwise" in this context means "'in a different way or manner.'" *Ante*, at 144; see also *James*, 550 U. S., at 218 (SCALIA, J., dissenting); Webster's New International Dictionary 1729 (2d ed. 1957) ("in another way, or in other ways"). Therefore, by using the word "otherwise" the writer draws a substantive connection between two sets only on one specific dimension—*i. e.*, whatever follows "otherwise." What that means here is that "committing one of the enumerated crimes . . . is *one way* to commit a crime 'involv[ing] a serious potential risk of physical injury to another'; and that *other ways* of committing a crime of that character similarly constitute 'violent felon[ies].'" *James*, *supra*, at 218 (SCALIA, J., dissenting).

The Court rejects this seemingly straightforward statutory analysis, reading the residual clause to mean that the unenumerated offenses must be similar to the enumerated offenses not only in the degree of risk they pose, but also "in kind," despite the fact that "otherwise" means that the *common* element of risk must be presented "'in a *different* way or manner.'" *Ante*, at 143, 144 (emphasis added). The Court's explanation for this interpretation seems to be that the enumerated crimes are "so far from clear in respect to the degree of risk each poses that it is difficult to accept clarification in respect to degree of risk as Congress' only reason for including them." *Ante*, at 143. While I certainly agree that the degree of risk associated with the enumerated crimes is unclear, I find it unthinkable that the solution to that problem is to write a different statute. The phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" limits inclusion in the statute only by a crime's degree of risk. See *James*,

supra, at 218 (SCALIA, J., dissenting). The use of the adjective "serious" seems to me to signify a purely quantitative measure of risk. If both an intentional and a negligent crime pose a 50% risk of death, could one be characterized as involving a "serious risk" and the other not? Surely not.

The Court supports its argument with that ever-ready refuge from the hardships of statutory text, the (judicially) perceived statutory purpose. According to the Court, because the Armed Career Criminal Act is concerned with "the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun," the statutory purpose favors applying §924(e)'s enhanced penalty only to those criminals "who might deliberately point the gun and pull the trigger." *Ante*, at 146. I cannot possibly infer that purpose from the statute. For all I know, the statute was meant to punish those who are indifferent to human life, or who are undeterred by the criminal penalties attached to the commission of other crimes (after all, the statute enhances penalties for drug traffickers, see §924(e)(2)(A)). While the Court's asserted purpose would surely be a reasonable one, it has no more grounding in the statutory text than do these other possibilities. And what is more, the Court's posited purpose is positively contradicted by the fact that one of the enumerated crimes—the unlawful use of explosives—may involve merely negligent or reckless conduct. See ALI, Model Penal Code §220.2(2) (1985) ("A person is guilty of a misdemeanor if he recklessly creates a risk of catastrophe in the employment of fire, explosives or other dangerous means"); *id.*, §220.3 ("A person is guilty of criminal mischief if he . . . damages tangible property of another purposely, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means").

The Court says that an interpretation of the residual clause that includes all crimes posing a serious risk of injury would render superfluous §924(e)(2)(B)(i), which provides

that a "violent felony" is any crime that "has as an element the use, attempted use, or threatened use of physical force against the person" of another. *Ante*, at 142 (internal quotation marks omitted). But the canon against surplusage has substantially less force when it comes to interpreting a broad residual clause like the one at issue here. Though the second clause renders the first superfluous, it would raise no eyebrows to refer to "crimes that entail the use of force and crimes that, while not entailing the use of force, nonetheless present a serious risk of injury to another person." In any event, the canon against surplusage merely helps decide between competing permissible interpretations of an ambiguous statute; it does not sanction writing in a requirement that Congress neglected to think of. And finally, come to think of it, the Court's solution does nothing whatever to solve the supposed surplusage problem. Crimes that include as an element "the use . . . of physical force against the person of another" are all embraced (and the reference to them thus rendered superfluous) by the requirement of "purposeful, 'violent,' and 'aggressive' conduct" that the Court invents.

III

Under my interpretation of §924(e), I must answer one question: Does drunk driving pose at least as serious a risk of physical injury to another as burglary? From the evidence presented by the Government, I cannot conclude so. Because of that, the rule of lenity requires that I resolve this case in favor of the defendant.

The Government cites the fact that in 2006, 17,062 persons died from alcohol-related car crashes, and that 15,121 of those deaths involved drivers with blood-alcohol concentrations of 0.08 or higher. See Brief for United States 17. Drunk driving is surely a national problem of great concern. But the fact that it kills many people each year tells us very little about whether a single act of drunk driving "involves conduct that presents a serious potential risk of physical in-

jury to another." It may well be that an even greater number of deaths occurs annually to pedestrians crossing the street; but that hardly means that crossing the street presents a serious potential risk of injury. Where the issue is "risk," the annual number of injuries from an activity must be compared with the annual incidents of the activity. Otherwise drunk driving could be said to pose a more serious risk of physical harm than murder. In addition, drunk driving is a combination of two activities: (1) drinking and (2) driving. If driving alone results in injury in a certain percentage of cases, it could hardly be said that the entirety of the risk posed by drunk driving can be attributed to the combination. And finally, injuries to the drunk drivers themselves must be excluded from the calculus, because the statute counts only injuries to other persons.

Needless to say, we do not have these relevant statistics. And even if we did, we would still need to know similar statistics for burglary, which are probably even harder to come by. This does not mean that I will never be able to identify a crime that falls under the residual clause. For some crimes, the severity of the risk will be obvious. Crimes like negligent homicide, see ALI, Model Penal Code §210.4 (1980), conspiracy to commit a violent crime, *id.*, §5.03 (1985), inciting to riot, 18 U. S. C. §2101, and the production of chemical weapons, §229, certainly pose a more serious risk of physical injury to others than burglary. (By contrast, the Court's approach eliminates from the residual clause all negligent crimes, even those that entail a 100% risk of physical injury such as negligent homicide.) But I can do no more than guess as to whether drunk driving poses a more serious risk than burglary, and I will not condemn a man to a minimum of 15 years in prison on the basis of such speculation. See *Ladner* v. *United States*, 358 U. S. 169, 178 (1958). Applying the rule of lenity to a statute that demands it, I would reverse the decision of the Court of Appeals.

JUSTICE ALITO, with whom JUSTICE SOUTER and JUSTICE THOMAS join, dissenting.

The statutory provision at issue in this case—the so-called "residual clause" of 18 U. S. C. § 924(e)(2)(B)(ii)—calls out for legislative clarification, and I am sympathetic to the result produced by the Court's attempt to craft a narrowing construction of this provision. Unfortunately, the Court's interpretation simply cannot be reconciled with the statutory text, and I therefore respectfully dissent.

In September 2004, after a night of heavy drinking, petitioner pointed a rifle at his aunt and threatened to shoot if she did not give him money. When she replied that she did not have any money, petitioner repeatedly pulled the trigger, but the rifle was unloaded and did not fire. Petitioner then threatened his sister in a similar fashion.

At the time of this incident, petitioner was a convicted felon. He had 12 prior convictions in New Mexico for driving under the influence of alcohol (DUI). While DUI is generally a misdemeanor under New Mexico law, the offense of DUI after at least three prior DUI convictions is a felony requiring a sentence of 18 months' imprisonment. N. M. Stat. Ann. § 66–8–102(G) (Supp. 2007).

Petitioner pleaded guilty to possession of a firearm by a convicted felon, in violation of 18 U. S. C. § 922(g)(1). A violation of that provision generally carries a maximum term of imprisonment of 10 years, see § 924(a)(2), but the District Court and the Court of Appeals held that petitioner was subject to a mandatory minimum sentence of 15 years because he had at least three prior convictions for the New Mexico felony of DUI after being convicted of DUI on at least three prior occasions. 377 F. Supp. 2d 1141, 1143–1145 (NM 2005); 470 F. 3d 964, 966–975, 977 (CA10 2006). The lower courts concluded that these offenses were crimes "punishable by imprisonment for a term exceeding one year" and "involve[d]

conduct that present[ed] a serious potential risk of physical injury to another." 18 U. S. C. §924(e)(2)(B).

The Court does not hold that the maximum term of imprisonment that petitioner faced on his felony DUI convictions was less than one year.[1] Nor does the Court dispute that petitioner's offenses involved a "potential risk of physical injury to another." *Ibid.* The only remaining question, therefore, is whether the risk presented by petitioner's qualifying DUI felony convictions was "serious," *i. e.*, "significant" or "important." See, *e. g.*, Webster's Third New International Dictionary 2073 (2002) (hereinafter Webster's); 15 Oxford English Dictionary 15 (def. 6(a)) (2d ed. 1989) (hereinafter OED). In my view, it was.

Statistics dramatically show that driving under the influence of alcohol is very dangerous. Each year, approximately 15,000 fatal alcohol-related crashes occur, accounting for roughly 40% of all fatal crashes.[2] Approximately a quarter million people are injured annually in alcohol-related

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[1] *United States* v. *Rodriquez*, now pending before the Court, presents the question "[w]hether a state drug-trafficking offense, for which state law authorized a ten-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U. S. C. §924(e)." Pet. for Cert., O. T. 2007, No. 06–1646, p. I. [REPORTER'S NOTE: See *post*, p. 377.]

[2] See National Highway Traffic Safety Administration (NHTSA), Traffic Safety Facts Annual Report, p. 56 (Table 34) (2006) (15,945 alcohol-related fatal crashes; 41%), (2005) (15,238; 39%), (2004) (14,968; 39%), (2003) (15,251; 40%), (2002) (15,626; 41%), (2001) (15,585; 41%), (2000) (14,847; 40%), (1999) (14,109; 38%), (1998) (14,278; 39%), (1997) (14,363; 38.5%), (1996) (15,249; 40.8%), online at http://www-nrd.nhtsa.dot.gov/CATS/listpublications.aspx?Id=E&ShowBy=DocType (Annual Reports 1994–2006 hyperlink) (all Internet materials as visited Apr. 11, 2008, and available in Clerk of Court's case file); see also *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem . . . . 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries . . .'" (footnote omitted)); *South Dakota* v. *Neville*, 459 U. S. 553, 558 (1983) ("The carnage caused by drunk drivers is well documented . . . . This Court . . . has repeatedly lamented the tragedy").

crashes.[3] The number of people who are killed each year by drunk drivers is far greater than the number of murders committed during any of the crimes specifically set out in the statutory provision at issue here, §924(e)(2)(B)(ii)—burglary, arson, extortion, and offenses involving the use of explosives.[4]

Petitioner's qualifying offenses, moreover, fell within the statute only because he had been convicted of DUI on at least three prior occasions. As noted, petitioner had *a dozen* prior DUI convictions. Persons who repeatedly drive drunk present a greatly enhanced danger that they and others will be injured as a result.[5] In addition, it has been

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[3] See NHTSA, *supra*, at 111 (Table 76) (2006) (278,000), (2005) (254,000), (2004) (248,000), (2003) (275,000), (2002) (258,000), (2001) (275,000), (2000) (310,000), (1999) (308,000), (1998) (305,000), (1997) (327,000), (1996) (321,000).

[4] According to statistics compiled by the Federal Bureau of Investigation, between 1996 and 2006 total annual murders never exceeded 15,000 after 1997. During that same 11-year period, the highest number of murders committed in the course of burglary was 123, the number of murders committed in the course of arson peaked at 105, and the number of murders involving explosives topped out at 14—all in 1996. See Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports/Crime in the United States (Annual Reports 1996–2006), online at http://www.fbi.gov/ucr/ucr.htm#cius. While murders committed in the course of extortion were not separately reported, common sense and the fact that the total number of murders was similar to the number of fatal alcohol-related crashes at least after 1997 indicates that murders involving extortion would not rival deaths in alcohol-related auto accidents. Even if one were to expand beyond murders to all fatalities and even injuries, it is estimated that arson causes the relatively small number of 475 deaths and over 2,000 injuries annually. Dept. of Homeland Security, U. S. Fire Administration, Arson in the United States, Vol. 1 Topical Fire Research Series, No. 8 (Jan. 2001, rev. Dec. 2001), online at http://www.usfa.dhs.gov/downloads/pdf/tfrs/v1i8-508.pdf.

[5] See *United States* v. *McCall*, 439 F. 3d 967, 972 (CA8 2006) (en banc) (citing Brewer et al., The Risk of Dying in Alcohol-Related Automobile Crashes Among Habitual Drunk Drivers, 331 New Eng. J. Med. 513 (1994)); Dept. of Justice, Office of Community Oriented Policing Services, Drunk Driving, Problem-Oriented Guides for Police, Problem-Specific Guides Series No. 36, p. 4 (Feb. 2006) ("By most estimates, although repeat

estimated that the ratio of DUI incidents to DUI arrests is between 250 to 1 and 2,000 to 1.[6] Accordingly, the risk presented by a 10th, 11th, and 12th DUI conviction may be viewed as the risk created by literally thousands of drunk-driving events. That risk was surely "serious," and therefore petitioner's offenses fell squarely within the language of the statute.

Moreover, taking the statutory language to mean what it says would not sweep in all DUI convictions. Most DUI convictions are not punishable by a term of imprisonment of more than one year and thus fall outside the scope of the statute.[7] Petitioner's convictions qualified only because of his extraordinary—and, I would say, extraordinarily dangerous—record of drunk driving.

The Court holds that an offense does not fall within the residual clause unless it is "roughly similar, in kind as well as in degree of risked posed," *ante*, at 143, to the crimes specifically listed in 18 U. S. C. § 924(e)(2)(B), *i. e.*, burglary, extortion, arson, and crimes involving the use of explosives. These crimes, according to the Court, "all typically involve purposeful, 'violent,' and 'aggressive' conduct." *Ante*, at 144–145 (quoting 470 F. 3d, at 980 (McConnell, J., dissenting)).

This interpretation cannot be squared with the text of the statute, which simply does not provide that an offense must be "purposeful," "violent," or "aggressive" in order to fall within the residual clause. Rather, after listing burglary,

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drunk drivers comprise a relatively small proportion of the total population of drivers, they are disproportionately responsible for alcohol-related crashes and other problems associated with drunk driving").

[6] Brewer, *supra*, text accompanying nn. 23–24; L. Taylor & S. Oberman, Drunk Driving Defense § 1.01 (2007).

[7] See National Conference of State Legislatures (NCSL), Criminal Status of State Drunk Driving Laws, online at http://www.ncsl.org/print/transportation/drunkdrivecriminal.pdf (2008) (surveying 50 States, the District of Columbia, and U. S. Territories, most of which treat the first DUI offense as a misdemeanor).

arson, extortion, and explosives offenses, the statute provides (in the residual clause) that an offense qualifies if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." Therefore, offenses falling within the residual clause must be similar to the named offenses in one respect only: They must "otherwise"—which is to say, "in a different manner," 10 OED 984 (def. B(1)); see also Webster's 1598—"involv[e] conduct that presents a serious potential risk of physical injury to another." Requiring that an offense must also be "purposeful," "violent," or "aggressive" amounts to adding new elements to the statute, but we "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U. S. 23, 29 (1997).

Each part of this additional, judicially added requirement presents other problems as well.

Purposeful. At least one State's DUI law requires proof of purposeful conduct. See *Tam* v. *State*, 232 Ga. App. 15, 15–16, 501 S. E. 2d 51, 52 (1998) (requiring proof of the intent to drive). In addition, many States recognize involuntary intoxication as a defense. See 4 R. Essen & R. Erwin, Defense of Drunk Driving Cases: Criminal—Civil §44.04 (2007). And even in States that do not require purposefulness, I have no doubt that the overwhelming majority of DUI defendants purposefully drank before getting behind the wheel and were purposefully operating their vehicles at the time of apprehension. I suspect that many DUI statutes do not require proof of purposefulness because the element is almost always present, requiring proof of the element would introduce an unnecessary complication, and it would make no sense to preclude conviction of those defendants who were so drunk that they did not even realize that they were behind the wheel.

Violent. It is clear that 18 U. S. C. §924(e)(2)(B) is not limited to "violent" crimes, for if it were, it would be redun-

dant. The prior subparagraph, § 924(e)(2)(A), includes offenses that have as an element the use or threatened use of violence.

Aggressive. The concept of "aggressive" crimes is vague, and in any event, it is hardly apparent why DUI—not to mention the species of felony DUI recidivism that resulted in petitioner's predicament—is not "aggressive." Driving can certainly involve "aggressive" conduct. Indeed, some States have created the offense of "aggressive driving." See M. Savage, M. Sundeen, & A. Teigen, Transportation Series, Traffic Safety and Public Health: State Legislative Action 2007, p. 17, and App. J (NCSL, No. 32, Dec. 2007), online at http://www.ncsl.org/print/transportation/07trafficsafety.pdf. Most States have a toll-free telephone number to call to report "aggressive" driving. See Campaign Safe & Sober, Phone Numbers for Reporting Impaired, Aggressive, or Unsafe Driving, online at http://www.nhtsa.dot.gov/people/outreach/safesobr/16qp/phone.html.

The Court defends its new statutory element on the ground that a defendant who merely engages in felony drunk driving is not likely to be "the kind of person who might deliberately point the gun and pull the trigger." *Ante*, at 146. The Court cites no empirical support for this conclusion, and its accuracy is not self-evident. Petitioner's pattern of behavior may or may not be typical of those defendants who have enough DUI convictions to qualify under N. M. Stat. Ann. § 66–8–102(G) and 18 U. S. C. § 924(e)(2)(B), but the example of his behavior in this case—pointing a gun at his aunt's head and repeatedly pulling the trigger—should surely be enough to counsel against uncritical reliance on stereotypes about "the type" of people who commit felony DUI violations.

Defendants who qualify for an enhanced sentence under § 924(e) (2000 ed. and Supp. V) based (in whole or in part) on felony DUI convictions share at least three characteristics that are relevant for present purposes. First, they are per-

sons who, in the judgment of Congress, cannot be trusted to use a firearm responsibly. In order to qualify for an enhanced sentence under § 924(e), a defendant must of course be convicted of violating the felon-in-possession statute, § 922(g) (2000 ed.). The felon-in-possession statute necessarily rests on the judgment that a person with a prior felony conviction cannot be trusted with a firearm. See *Caron* v. *United States*, 524 U. S. 308, 315 (1998) ("Congress meant to keep guns away from all offenders who, the Federal Government feared, might cause harm . . . "). And there is no dispute that a prior felony DUI conviction qualifies as a felony under the felon-in-possession law. If Congress thought that a person with a prior felony DUI conviction is not "the kind of person" who is likely to use a gun unlawfully, why would Congress have made it a crime for such a person to possess a gun?

Second, defendants with DUI convictions that are counted under 18 U. S. C. § 924(e)(2)(B) are likely to have serious alcohol abuse problems. As previously mentioned, ordinary DUI convictions are generally not counted under § 924(e) because they are not punishable by imprisonment for more than a year. Such penalties are generally reserved for persons, like petitioner, with a record of repeated DUI violations. See NCSL, *supra*. Such individuals are very likely to have serious alcohol abuse problems and a propensity to engage in irresponsible conduct while under the influence. Alcohol use often precedes violent crimes, see, *e. g.*, Roizen, Epidemiological Issues in Alcohol-Related Violence, in 13 Recent Developments in Alcoholism 7, 8–9 (M. Galanter ed. 1997), and thus there is reason to worry about the misuse of firearms by defendants whose alcohol abuse problems are serious enough to result in felony DUI convictions.

Third, defendants with DUI convictions that are counted under § 924(e)(2)(B) have either (1) such serious alcohol abuse problems that they have at least three prior felony DUI convictions or (2) both one or two felony DUI convictions and

one or two offenses that fall under §924(e)(2)(B)(i) (offenses that have "as an element the use, attempted use, or threatened use of physical force") or that are specifically set out in §924(e)(2)(B)(ii) (burglary, arson, extortion, or an explosives offense). Defendants with three felony DUI convictions are likely to be super–DUI-recidivists like petitioner. Defendants with a combination of felony DUI and other qualifying convictions—for example, convictions for assault or burglary—are persons who, even by the Court's lights, could be classified as "the kind of person who might deliberately point [a] gun and pull the trigger."

Unlike the Court, I cannot say that persons with these characteristics are less likely to use a gun illegally than are persons convicted of other qualifying felonies.

JUSTICE SCALIA's concurrence takes a different approach, but his analysis is likewise flawed. JUSTICE SCALIA would hold (1) that an offense does not fall within the residual clause unless it presents a risk that is at least as great as that presented by the least dangerous of the enumerated offenses; (2) that burglary is the least dangerous of the enumerated offenses; (3) that the relevant measure of risk is the risk that the typical burglary, DUI, etc., would result in injury; and (4) that the risk presented by an incident of DUI is less than the risk presented by a burglary.

JUSTICE SCALIA, like the Court, does not follow the statutory language. The statute says that offenses falling within the residual clause must present "a serious potential risk of physical injury to another." The statute does not say that these offenses must present at least as much risk as the enumerated offenses.

The statute also does not say, as JUSTICE SCALIA would hold, that the relevant risk is the risk that each incident of DUI will result in injury. I see no basis for concluding that Congress was not also concerned with the risk faced by potential victims, particularly since the statute explicitly refers to "potential risk." Drunk driving is regarded as a severe

societal problem in large measure because of the very large number of victims it produces each year.

Finally, JUSTICE SCALIA's conclusion that burglary is the least risky of the enumerated offenses is based on a procrustean reading of §924(e)(2)(B)(ii). This provision refers, without qualification, to "extortion." In his dissent in *James* v. *United States*, 550 U. S. 192 (2007), JUSTICE SCALIA concluded that many forms of extortion are "inherently *unlikely* to cause physical harm." *Id.*, at 223 (emphasis in original). Only by finding that the term "extortion" in §924(e)(2)(B)(ii) really means only certain forms of extortion was JUSTICE SCALIA able to come to the conclusion that burglary is the least risky of the enumerated offenses.

For all these reasons, I would affirm the decision of the Tenth Circuit.

Syllabus

VIRGINIA *v.* MOORE

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 06–1082. Argued January 14, 2008—Decided April 23, 2008

Rather than issuing the summons required by Virginia law, police arrested respondent Moore for the misdemeanor of driving on a suspended license. A search incident to the arrest yielded crack cocaine, and Moore was tried on drug charges. The trial court declined to suppress the evidence on Fourth Amendment grounds. Moore was convicted. Ultimately, the Virginia Supreme Court reversed, reasoning that the search violated the Fourth Amendment because the arresting officers should have issued a citation under state law, and the Fourth Amendment does not permit search incident to citation.

Held: The police did not violate the Fourth Amendment when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to the arrest. Pp. 168–178.

(a) Because the founding era's statutes and common law do not support Moore's view that the Fourth Amendment was intended to incorporate statutes, this is "not a case in which the claimant can point to 'a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since,'" *Atwater* v. *Lago Vista*, 532 U. S. 318, 345. Pp. 168–171.

(b) Where history provides no conclusive answer, this Court has analyzed a search or seizure in light of traditional reasonableness standards "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, 526 U. S. 295, 300. Applying that methodology, this Court has held that when an officer has probable cause to believe a person committed even a minor crime, the arrest is constitutionally reasonable. *Atwater*, *supra*, at 354. This Court's decisions counsel against changing the calculus when a State chooses to protect privacy beyond the level required by the Fourth Amendment. See, *e. g.*, *Whren* v. *United States*, 517 U. S. 806. *United States* v. *Di Re*, 332 U. S. 581, distinguished. Pp. 171–173.

(c) The Court adheres to this approach because an arrest based on probable cause serves interests that justify seizure. Arrest ensures that a suspect appears to answer charges and does not continue a crime,

Syllabus

and it safeguards evidence and enables officers to conduct an in-custody investigation. A State's choice of a more restrictive search-and-seizure policy does not render less restrictive ones unreasonable, and hence unconstitutional. While States are free to require their officers to engage in nuanced determinations of the need for arrest as a matter of their own law, the Fourth Amendment should reflect administrable bright-line rules. Incorporating state arrest rules into the Constitution would make Fourth Amendment protections as complex as the underlying state law, and variable from place to place and time to time. Pp. 173–176.

(d) The Court rejects Moore's argument that even if the Constitution allowed his arrest, it did not allow the arresting officers to search him. Officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence. *United States* v. *Robinson*, 414 U. S. 218. While officers issuing citations do not face the same danger, and thus do not have the same authority to search, *Knowles* v. *Iowa*, 525 U. S. 113, the officers arrested Moore, and therefore faced the risks that are "an adequate basis for treating all custodial arrests alike for purposes of search justification," *Robinson*, *supra*, at 235. Pp. 176–178.

272 Va. 717, 636 S. E. 2d 395, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 178.

Stephen R. McCullough, Deputy State Solicitor General of Virginia, argued the cause for petitioner. With him on the briefs were *Robert F. McDonnell*, Attorney General, *William E. Thro*, State Solicitor General, *William C. Mims*, Chief Deputy Attorney General, *Marla Graff Decker*, Deputy Attorney General, and *Leah A. Darron*, Senior Assistant Attorney General.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae*. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, and *Matthew D. Roberts*.

Thomas C. Goldstein argued the cause for respondent. With him on the brief were *S. Jane Chittom*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Amy Howe*, and *Kevin K. Russell*.*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law.

I

On February 20, 2003, two city of Portsmouth police officers stopped a car driven by David Lee Moore. They had heard over the police radio that a person known as "Chubs" was driving with a suspended license, and one of the officers knew Moore by that nickname. The officers determined

*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Kent C. Sullivan*, First Assistant Attorney General, *Eric J. R. Nichols*, Deputy Attorney General for Criminal Justice, *R. Ted Cruz*, Solicitor General, and *Susanna Dokupil* and *Adam W. Aston*, Assistant Solicitors General, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Bill McCollum* of Florida, *Lawrence G. Wasden* of Idaho, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, and *Bruce A. Salzburg* of Wyoming; and for Wayne County, Michigan, by *Kym L. Worthy* and *Timothy A. Baughman*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *William H. Neukom* and *Rory K. Little*; for the American Civil Liberties Union et al. by *Susan N. Herman*, *Steven R. Shapiro*, and *Rebecca Glenberg*; and for the Virginia Trial Lawyers Association by *David B. Hargett*.

E. Joshua Rosenkranz, *Warrington S. Parker III*, and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

that Moore's license was in fact suspended, and arrested him for the misdemeanor of driving on a suspended license, which is punishable under Virginia law by a year in jail and a $2,500 fine, Va. Code Ann. §§18.2–11 (Lexis 2004), 18.2–272 (Supp. 2007), 46.2–301(C) (2005). The officers subsequently searched Moore and found that he was carrying 16 grams of crack cocaine and $516 in cash.[1] See 272 Va. 717, 636 S. E. 2d 395 (2006); 45 Va. App. 146, 609 S. E. 2d 74 (2005).

Under state law, the officers should have issued Moore a summons instead of arresting him. Driving on a suspended license, like some other misdemeanors, is not an arrestable offense except as to those who "fail or refuse to discontinue" the violation, and those whom the officer reasonably believes to be likely to disregard a summons, or likely to harm themselves or others. Va. Code Ann. §19.2–74 (Lexis 2004). The intermediate appellate court found none of these circumstances applicable, and Virginia did not appeal that determination. See 272 Va., at 720, n. 3, 636 S. E. 2d, at 396–397, n. 3. Virginia also permits arrest for driving on a suspended license in jurisdictions where "prior general approval has been granted by order of the general district court," Va. Code Ann. §46.2–936; Virginia has never claimed such approval was in effect in the county where Moore was arrested.

Moore was charged with possessing cocaine with the intent to distribute it in violation of Virginia law. He filed a pretrial motion to suppress the evidence from the arrest search. Virginia law does not, as a general matter, require suppression of evidence obtained in violation of state law. See 45 Va. App., at 160–162, 609 S. E. 2d, at 82

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[1] The arresting officers did not perform a search incident to arrest immediately upon taking Moore into custody, because each of them mistakenly believed that the other had done so. App. 54–55; see also *id.*, at 33–34. They realized their mistake after arriving with Moore at Moore's hotel room, which they had obtained his consent to search, and they searched his person there. *Ibid.* Moore does not contend that this delay violated the Fourth Amendment.

(Annunziata, J., dissenting). Moore argued, however, that suppression was required by the Fourth Amendment. The trial court denied the motion, and after a bench trial found Moore guilty of the drug charge and sentenced him to a 5-year prison term, with one year and six months of the sentence suspended. The conviction was reversed by a panel of Virginia's intermediate court on Fourth Amendment grounds, *id.*, at 149–150, 609 S. E. 2d, at 76, reinstated by the intermediate court sitting en banc, 47 Va. App. 55, 622 S. E. 2d 253 (2005), and finally reversed again by the Virginia Supreme Court, 272 Va., at 725, 636 S. E. 2d, at 400. The Court reasoned that since the arresting officers should have issued Moore a citation under state law, and the Fourth Amendment does not permit search incident to citation, the arrest search violated the Fourth Amendment. *Ibid.* We granted certiorari. 551 U. S. 1187 (2007).

II

The Fourth Amendment protects "against unreasonable searches and seizures" of (among other things) the person. In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve. See *Wyoming* v. *Houghton*, 526 U. S. 295, 299 (1999); *Wilson* v. *Arkansas*, 514 U. S. 927, 931 (1995).

We are aware of no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted.[2] The immediate object of the

[2] *Atwater* v. *Lago Vista*, 532 U. S. 318 (2001), rejected the view JUSTICE GINSBURG advances that the legality of arrests for misdemeanors involving no breach of the peace "depended on statutory authorization." *Post*, at 178, n. 1 (opinion concurring in judgment). *Atwater* cited both of the sources on which JUSTICE GINSBURG relies for a limited view of common-law arrest authority, but it also identified and quoted numerous treatises

Fourth Amendment was to prohibit the general warrants and writs of assistance that English judges had employed against the colonists, *Boyd* v. *United States*, 116 U. S. 616, 624–627 (1886); *Payton* v. *New York*, 445 U. S. 573, 583–584 (1980). That suggests, if anything, that founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.

Joseph Story, among others, saw the Fourth Amendment as "little more than the affirmance of a great constitutional doctrine of the common law," 3 Commentaries on the Constitution of the United States § 1895, p. 748 (1833), which Story defined in opposition to statutes, see Codification of the Common Law in The Miscellaneous Writings of Joseph Story 698, 699, 701 (W. Story ed. 1852). No early case or commentary, to our knowledge, suggested the Amendment was intended to incorporate subsequently enacted statutes. None of the early Fourth Amendment cases that scholars have identified sought to base a constitutional claim on a violation of a state or federal statute concerning arrest. See Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 613–614 (1999);[3] see also T. Taylor, Two Studies in Constitutional Interpretation 44–45 (1969).

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that described common-law authority to arrest for minor misdemeanors without limitation to cases in which a statute authorized arrest. See 532 U. S., at 330–332. *Atwater* noted that many statutes authorized arrest for misdemeanors other than breaches of the peace, but it concluded that the view of arrest authority as extending beyond breaches of the peace also reflected judge-made common law. *Id.*, at 330–331. Particularly since *Atwater* considered the materials on which JUSTICE GINSBURG relies, we see no reason to revisit the case's conclusion.

[3] Of the early cases that Davies collects, see 98 Mich. L. Rev., at 613, n. 174; *id.*, at 614, n. 175, the lone decision to treat statutes as relevant to the Fourth Amendment's contours simply applied the principle that statutes enacted in the years immediately before or after the Amendment was adopted shed light on what citizens at the time of the Amendment's enactment saw as reasonable. *Boyd* v. *United States*, 116 U. S. 616, 622–623 (1886).

Of course such a claim would not have been available against state officers, since the Fourth Amendment was a restriction only upon federal power, see *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833). But early Congresses tied the arrest authority of federal officers to state laws of arrest. See *United States* v. *Di Re*, 332 U. S. 581, 589 (1948); *United States* v. *Watson*, 423 U. S. 411, 420 (1976). Moreover, even though several state constitutions also prohibited unreasonable searches and seizures, citizens who claimed officers had violated state restrictions on arrest did not claim that the violations also ran afoul of the state constitutions.[4] The apparent absence of such litigation is particularly striking in light of the fact that searches incident to warrantless arrests (which is to say arrests in which the officer was not insulated from private suit) were, as one commentator has put it, "taken for granted" at the founding, Taylor, *supra*, at 45, as were warrantless arrests themselves, Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 764 (1994).

There are a number of possible explanations of why such constitutional claims were not raised. Davies, for example, argues that actions taken in violation of state law could not qualify as state action subject to Fourth Amendment constraints. 98 Mich. L. Rev., at 660–663. Be that as it may, as Moore adduces neither case law nor commentaries to support his view that the Fourth Amendment was intended to incorporate statutes, this is "not a case in which the claimant can point to 'a clear answer [that] existed in 1791 and has

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[4] Massachusetts, for example, had a state constitutional provision paralleling the Fourth Amendment, but the litigants in the earliest cases we have identified claiming violations of arrest statutes in the Commonwealth did not argue that their arrests violated the Commonwealth's Constitution. See *Brock* v. *Stimson*, 108 Mass. 520 (1871); *Phillips* v. *Fadden*, 125 Mass. 198 (1878); see also *Tubbs* v. *Tukey*, 57 Mass. 438 (1849) (asserting violation of state common law concerning arrest but not asserting violation of state constitution).

been generally adhered to by the traditions of our society ever since.'" *Atwater* v. *Lago Vista*, 532 U. S. 318, 345 (2001) (alteration in original).

III

A

When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Houghton*, 526 U. S., at 300; see also *Atwater*, 532 U. S., at 346. That methodology provides no support for Moore's Fourth Amendment claim. In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable. *Id.*, at 354; see also, *e. g.*, *Devenpeck* v. *Alford*, 543 U. S. 146, 152 (2004); *Gerstein* v. *Pugh*, 420 U. S. 103, 111 (1975); *Brinegar* v. *United States*, 338 U. S. 160, 164, 170, 175–176 (1949).

Our decisions counsel against changing this calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires. We have treated additional protections exclusively as matters of state law. In *Cooper* v. *California*, 386 U. S. 58 (1967), we reversed a state court that had held the search of a seized vehicle to be in violation of the Fourth Amendment because state law did not explicitly authorize the search. We concluded that whether state law authorized the search was irrelevant. States, we said, remained free "to impose higher standards on searches and seizures than required by the Federal Constitution," *id.*, at 62, but regardless of state rules, police could search a lawfully seized vehicle as a matter of federal constitutional law.

In *California* v. *Greenwood*, 486 U. S. 35 (1988), we held that search of an individual's garbage forbidden by California's Constitution was not forbidden by the Fourth Amendment. "[W]hether or not a search is reasonable within the meaning of the Fourth Amendment," we said, has never "depend[ed] on the law of the particular State in which the search occurs." *Id.*, at 43. While "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution," *ibid.*, state law did not alter the content of the Fourth Amendment.

We have applied the same principle in the seizure context. *Whren* v. *United States*, 517 U. S. 806 (1996), held that police officers had acted reasonably in stopping a car, even though their action violated regulations limiting the authority of plainclothes officers in unmarked vehicles. We thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices—even practices set by rule. While those practices "vary from place to place and from time to time," Fourth Amendment protections are not "so variable" and cannot "be made to turn upon such trivialities." *Id.*, at 815.

Some decisions earlier than these excluded evidence obtained in violation of state law, but those decisions rested on our supervisory power over the federal courts, rather than the Constitution. In *Di Re*, 332 U. S. 581, federal and state officers collaborated in an investigation that led to an arrest for a federal crime. The Government argued that the legality of an arrest for a federal offense was a matter of federal law. *Id.*, at 589. We concluded, however, that since Congress had provided that arrests with warrants must be made in accordance with state law, the legality of arrests without warrants should also be judged according to state-law standards. *Id.*, at 589–590. This was plainly not a rule we derived from the Constitution, however, because we repeatedly invited Congress to change it by statute—saying that state

law governs the validity of a warrantless arrest "in [the] absence of an applicable federal statute," *id.*, at 589, and that the *Di Re* rule applies "except in those cases where Congress has enacted a federal rule," *id.*, at 589–590.

Later decisions did not expand the rule of *Di Re*. *Johnson* v. *United States*, 333 U. S. 10 (1948), relied on *Di Re* to suppress evidence obtained under circumstances identical in relevant respects to those in that case. See 333 U. S., at 12, 15, n. 5. And *Michigan* v. *DeFillippo*, 443 U. S. 31 (1979), upheld a warrantless arrest in a case where compliance with state law was not at issue. While our opinion said that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law," it also said that a warrantless arrest satisfies the Constitution so long as the officer has "probable cause to believe that the suspect has committed or is committing an offense." *Id.*, at 36. We need not pick and choose among the dicta: Neither *Di Re* nor the cases following it held that violations of state arrest law are also violations of the Fourth Amendment, and our more recent decisions, discussed above, have indicated that when States go above the Fourth Amendment minimum, the Constitution's protections concerning search and seizure remain the same.

B

We are convinced that the approach of our prior cases is correct, because an arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure. *Whren*, *supra*, at 817; *Atwater*, *supra*, at 354. Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation. See W. LaFave, Arrest: The Decision to Take a Suspect Into Custody 177–202 (1965).

Moore argues that a State has no interest in arrest when it has a policy against arresting for certain crimes. That is

not so, because arrest will still ensure a suspect's appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly. State arrest restrictions are more accurately characterized as showing that the State values its interests in forgoing arrests more highly than its interests in making them, see, *e. g.*, Dept. of Justice, National Institute of Justice, D. Whitcomb, B. Lewin, & M. Levine, Issues and Practices: Citation Release 17 (Mar. 1984) (describing cost savings as a principal benefit of citation-release ordinances); or as showing that the State places a higher premium on privacy than the Fourth Amendment requires. A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.

If we concluded otherwise, we would often frustrate rather than further state policy. Virginia chooses to protect individual privacy and dignity more than the Fourth Amendment requires, but it also chooses not to attach to violations of its arrest rules the potent remedies that federal courts have applied to Fourth Amendment violations. Virginia does not, for example, ordinarily exclude from criminal trials evidence obtained in violation of its statutes. See 45 Va. App., at 161, 609 S. E. 2d, at 82 (Annunziata, J., dissenting) (citing *Janis* v. *Commonwealth*, 22 Va. App. 646, 651, 472 S. E. 2d 649, 652 (1996)). Moore would allow Virginia to accord enhanced protection against arrest only on pain of accompanying that protection with federal remedies for Fourth Amendment violations, which often include the exclusionary rule. States unwilling to lose control over the remedy would have to abandon restrictions on arrest altogether. This is an odd consequence of a provision designed to protect against searches and seizures.

Even if we thought that state law changed the nature of the Commonwealth's interests for purposes of the Fourth

Amendment, we would adhere to the probable-cause standard. In determining what is reasonable under the Fourth Amendment, we have given great weight to the "essential interest in readily administrable rules." *Atwater*, 532 U. S., at 347. In *Atwater*, we acknowledged that nuanced judgments about the need for warrantless arrest were desirable, but we nonetheless declined to limit to felonies and disturbances of the peace the Fourth Amendment rule allowing arrest based on probable cause to believe a law has been broken in the presence of the arresting officer. *Id.*, at 346–347. The rule extends even to minor misdemeanors, we concluded, because of the need for a bright-line constitutional standard. If the constitutionality of arrest for minor offenses turned in part on inquiries as to risk of flight and danger of repetition, officers might be deterred from making legitimate arrests. *Id.*, at 351. We found little to justify this cost, because there was no "epidemic of unnecessary minor-offense arrests," and hence "a dearth of horribles demanding redress." *Id.*, at 353.

Incorporating state-law arrest limitations into the Constitution would produce a constitutional regime no less vague and unpredictable than the one we rejected in *Atwater*. The constitutional standard would be only as easy to apply as the underlying state law, and state law can be complicated indeed. The Virginia statute in this case, for example, calls on law enforcement officers to weigh just the sort of case-specific factors that *Atwater* said would deter legitimate arrests if made part of the constitutional inquiry. It would authorize arrest if a misdemeanor suspect fails or refuses to discontinue the unlawful act, or if the officer believes the suspect to be likely to disregard a summons. Va. Code Ann. § 19.2–74.A.1. *Atwater* specifically noted the "extremely poor judgment" displayed in arresting a local resident who would "almost certainly" have discontinued the offense and who had "no place to hide and no incentive to flee." 532 U. S., at 346–347. It nonetheless declined to make those

considerations part of the constitutional calculus. *Atwater* differs from this case in only one significant respect: It considered (and rejected) federal constitutional remedies for *all* minor-misdemeanor arrests; Moore seeks them in only that *subset* of minor-misdemeanor arrests in which there is the least to be gained—that is, where the State has already acted to constrain officers' discretion and prevent abuse. Here we confront fewer horribles than in *Atwater*, and less of a need for redress.

Finally, linking Fourth Amendment protections to state law would cause them to "vary from place to place and from time to time," *Whren*, 517 U. S., at 815. Even at the same place and time, the Fourth Amendment's protections might vary if federal officers were not subject to the same statutory constraints as state officers. In *Elkins* v. *United States*, 364 U. S. 206, 210–212 (1960), we noted the practical difficulties posed by the "silver-platter doctrine," which had imposed more stringent limitations on federal officers than on state police acting independent of them. It would be strange to construe a constitutional provision that did not apply to the States at all when it was adopted to now restrict state officers more than federal officers, solely because the States have passed search-and-seizure laws that are the prerogative of independent sovereigns.

We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections.

IV

Moore argues that even if the Constitution allowed his arrest, it did not allow the arresting officers to search him. We have recognized, however, that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence. *United*

States v. *Robinson*, 414 U. S. 218 (1973). We have described this rule as covering any "lawful arrest," *id.*, at 235, with constitutional law as the reference point. That is to say, we have equated a lawful arrest with an arrest based on probable cause: "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; *that intrusion being lawful*, a search incident to the arrest requires no additional justification." *Ibid.* (emphasis added). Moore correctly notes that several important state-court decisions have defined the lawfulness of arrest in terms of compliance with state law. See Brief for Respondent 32–33 (citing *People* v. *Chiagles*, 237 N. Y. 193, 197, 142 N. E. 583, 584 (1923); *People* v. *DeFore*, 242 N. Y. 13, 17–19, 150 N. E. 585, 586 (1926)). But it is not surprising that States have used "lawful" as shorthand for compliance with state law, while our constitutional decision in *Robinson* used "lawful" as shorthand for compliance with constitutional constraints.

The interests justifying search are present whenever an officer makes an arrest. A search enables officers to safeguard evidence, and, most critically, to ensure their safety during "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." *Robinson*, *supra*, at 234–235. Officers issuing citations do not face the same danger, and we therefore held in *Knowles* v. *Iowa*, 525 U. S. 113 (1998), that they do not have the same authority to search. We cannot agree with the Virginia Supreme Court that *Knowles* controls here. The state officers *arrested* Moore, and therefore faced the risks that are "an adequate basis for treating all custodial arrests alike for purposes of search justification." *Robinson*, *supra*, at 235.

The Virginia Supreme Court may have concluded that *Knowles* required the exclusion of evidence seized from Moore because, under state law, the officers who arrested Moore should have issued him a citation instead. This argu-

ment might have force if the Constitution forbade Moore's arrest, because we have sometimes excluded evidence obtained through unconstitutional methods in order to deter constitutional violations. See *Wong Sun* v. *United States*, 371 U. S. 471, 484–485, 488 (1963). But the arrest rules that the officers violated were those of state law alone, and as we have just concluded, it is not the province of the Fourth Amendment to enforce state law. That Amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest.

* * *

We reaffirm against a novel challenge what we have signaled for more than half a century. When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety. The judgment of the Supreme Court of Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring in the judgment.

I find in the historical record more support for Moore's position than the Court does, *ante*, at 168–171.[1] Further,

[1] Under the common law prevailing at the end of the 19th century, it appears that arrests for minor misdemeanors, typically involving no breach of the peace, depended on statutory authorization. See Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 674 (1924) ("Neither [an officer] nor [a citizen], *without statutory authority* may arrest [a defendant] for . . . a misdemeanor which is not a [breach of the peace]" (emphasis added)); 9 Halsbury, Laws of England §§608, 611–612, 615 (1909). See also *Atwater* v. *Lago Vista*, 532 U. S. 318, 342–345 (2001) (noting 19th-century decisions upholding statutes extending warrantless arrest authority to misdemeanors, other than breaches of the peace, committed in a police officer's presence); Wilgus, *supra*, at 551 (warrantless misdemeanor

our decision in *United States* v. *Di Re*, 332 U. S. 581, 587–590 (1948), requiring suppression of evidence gained in a search incident to an unlawful arrest, seems to me pinned to the Fourth Amendment and not to our "supervisory power," *ante*, at 172.[2] And I am aware of no "long line of cases" holding that, regardless of state law, probable cause renders every warrantless arrest for crimes committed in the presence of an arresting officer "constitutionally reasonable," *ante*, at 171.[3]

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arrests "made under authority of a statute must conform strictly to its provisions; otherwise they will not be valid, and the one arresting becomes a trespasser").

Noting colonial hostility to general warrants and writs of assistance, the Court observes that "founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness." *Ante*, at 169. The practices resisted by the citizenry, however, served to invade the people's privacy, not to shield it.

[2]The Court attributes *Di Re*'s suppression ruling to our "supervisory power," not to "a rule we derived from the Constitution." *Ante*, at 172. Justice Jackson, author of *Di Re*, however, did not mention "supervisory power," placed the decision in a Fourth Amendment context, see 332 U. S., at 585, and ended with a reminder that "our Constitution [places] obstacles in the way of a too permeating police surveillance," *id.*, at 595. The *Di Re* opinion, I recognize, is somewhat difficult to parse. Allied to *Di Re*'s Fourth Amendment instruction, the Court announced a choice-of-law rule not derived from the Constitution: When a state officer makes a warrantless arrest for a federal crime, federal arrest law governs the legality of the arrest; but absent a federal statute in point, "the law of the state where an arrest without warrant takes place determines its validity." *Id.*, at 588–589.

[3]Demonstrative of the "long line," the Court lists *Atwater*, 532 U. S., at 354, *Devenpeck* v. *Alford*, 543 U. S. 146, 152 (2004), *Brinegar* v. *United States*, 338 U. S. 160, 164, 170, 175–176 (1949), and *Gerstein* v. *Pugh*, 420 U. S. 103, 111 (1975). *Ante*, at 171. But in all of these cases, unlike Moore's case, state law authorized the arrests. The warrantless misdemeanor arrest in *Atwater* was authorized by Tex. Transp. Code Ann. §543.001 (West 1999). See 532 U. S., at 323. The warrantless misdemeanor arrest in *Devenpeck* was authorized by Wash. Rev. Code Ann. §10.31.100 (Michie 1997). In *Brinegar*, whether the warrantless arrest was for a misdemeanor or a felony, it was authorized by state law. See

I agree with the Court's conclusion and its reasoning, however, to this extent. In line with the Court's decision in *Atwater* v. *Lago Vista*, 532 U. S. 318, 354 (2001), Virginia could have made driving on a suspended license an arrestable offense. The Commonwealth chose not to do so. Moore asks us to credit Virginia law on a police officer's arrest authority, but only in part. He emphasizes Virginia's classification of driving on a suspended license as a nonarrestable misdemeanor. Moore would have us ignore, however, the limited consequences Virginia attaches to a police officer's failure to follow the Commonwealth's summons-only instruction. For such an infraction, the officer may be disciplined and the person arrested may bring a tort suit against the officer. But Virginia law does not demand the suppression of evidence seized by an officer who arrests when he should have issued a summons.

The Fourth Amendment, today's decision holds, does not put States to an all-or-nothing choice in this regard. A State may accord protection against arrest beyond what the Fourth Amendment requires, yet restrict the remedies available when police deny to persons they apprehend the extra protection state law orders. See *ante*, at 173–174. Because I agree that the arrest and search Moore challenges violated Virginia law, but did not violate the Fourth Amendment, I join the Court's judgment.

Okla. Stat., Tit. 22, §196 (1941). *Gerstein* involved a challenge to the State's preliminary hearing procedures, not to the validity of a particular arrest. See 420 U. S., at 105. The record does not indicate whether the respondents' offenses were committed in the officer's presence or whether the arrests were made under warrant. See *id.*, at 105, n. 1. But it does indicate that the crimes involved were serious felonies, see *ibid.*, and state law authorized arrest without warrant when "[a] felony has been committed and [the officer] reasonably believes that the [apprehended] person committed it," Fla. Stat. Ann. §901.15(2) (West Supp. 1973).

Syllabus

CRAWFORD ET AL. *v.* MARION COUNTY ELECTION BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07–21. Argued January 9, 2008—Decided April 28, 2008*

After Indiana enacted an election law (SEA 483) requiring citizens voting in person to present government-issued photo identification, petitioners filed separate suits challenging the law's constitutionality. Following discovery, the District Court granted respondents summary judgment, finding the evidence in the record insufficient to support a facial attack on the statute's validity. In affirming, the Seventh Circuit declined to judge the law by the strict standard set for poll taxes in *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, finding the burden on voters offset by the benefit of reducing the risk of fraud.

Held: The judgment is affirmed.

472 F. 3d 949, affirmed.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that the evidence in the record does not support a facial attack on SEA 483's validity. Pp. 189–204.

(a) Under *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. However, "even-handed restrictions" protecting the "integrity and reliability of the electoral process itself" satisfy *Harper*'s standard. *Anderson* v. *Celebrezze*, 460 U. S. 780, 788, n. 9. A state law's burden on a political party, an individual voter, or a discrete class of voters must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." *Norman* v. *Reed*, 502 U. S. 279, 288–289. Pp. 189–191.

(b) Each of Indiana's asserted interests is unquestionably relevant to its interest in protecting the integrity and reliability of the electoral process. The first is the interest in deterring and detecting voter fraud. Indiana has a valid interest in participating in a nationwide effort to improve and modernize election procedures criticized as antiquated and inefficient. Indiana also claims a particular interest in preventing voter fraud in response to the problem of voter registration rolls with a large number of names of persons who are either deceased or no longer live in Indiana. While the record contains no evidence

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*Together with No. 07–25, *Indiana Democratic Party et al.* v. *Rokita, Secretary of State of Indiana, et al.*, also on certiorari to the same court.

Syllabus

that the fraud SEA 483 addresses—in-person voter impersonation at polling places—has actually occurred in Indiana, such fraud has occurred in other parts of the country, and Indiana's own experience with voter fraud in a 2003 mayoral primary demonstrates a real risk that voter fraud could affect a close election's outcome. There is no question about the legitimacy or importance of a State's interest in counting only eligible voters' votes. Finally, Indiana's interest in protecting public confidence in elections, while closely related to its interest in preventing voter fraud, has independent significance, because such confidence encourages citizen participation in the democratic process. Pp. 191–197.

(c) The relevant burdens here are those imposed on eligible voters who lack photo identification cards that comply with SEA 483. Because Indiana's cards are free, the inconvenience of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph does not qualify as a substantial burden on most voters' right to vote, or represent a significant increase over the usual burdens of voting. The severity of the somewhat heavier burden that may be placed on a limited number of persons—*e. g.*, elderly persons born out of State, who may have difficulty obtaining a birth certificate—is mitigated by the fact that eligible voters without photo identification may cast provisional ballots that will be counted if they execute the required affidavit at the circuit court clerk's office. Even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek. Pp. 197–200.

(d) Petitioners bear a heavy burden of persuasion in seeking to invalidate SEA 483 in all its applications. This Court's reasoning in *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, applies with added force here. Petitioners argue that Indiana's interests do not justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office, but it is not possible to quantify, based on the evidence in the record, either that burden's magnitude or the portion of the burden that is fully justified. A facial challenge must fail where the statute has a "'plainly legitimate sweep.'" *Id.*, at 449. When considering SEA 483's broad application to all Indiana voters, it "imposes only a limited burden on voters' rights." *Burdick* v. *Takushi*, 504 U. S. 428, 439. The "precise interests" advanced by Indiana are therefore sufficient to defeat petitioners' facial challenge. *Id.*, at 434. Pp. 200–203.

(e) Valid neutral justifications for a nondiscriminatory law, such as SEA 483, should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. Pp. 203–204.

Syllabus

JUSTICE SCALIA, joined by JUSTICE THOMAS and JUSTICE ALITO, was of the view that petitioners' premise that the voter-identification law might have imposed a special burden on some voters is irrelevant. The law should be upheld because its overall burden is minimal and justified. A law respecting the right to vote should be evaluated under the approach in *Burdick* v. *Takushi*, 504 U. S. 428, which calls for application of a deferential, "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote, *id.*, at 433–434. The different ways in which Indiana's law affects different voters are no more than different impacts of the single burden that the law uniformly imposes on all voters: To vote in person, everyone must have and present a photo identification that can be obtained for free. This is a generally applicable, nondiscriminatory voting regulation. The law's universally applicable requirements are eminently reasonable because the burden of acquiring, possessing, and showing a free photo identification is not a significant increase over the usual voting burdens, and the State's stated interests are sufficient to sustain that minimal burden. Pp. 204–209.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY, J., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS and ALITO, JJ., joined, *post*, p. 204. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 209. BREYER, J., filed a dissenting opinion, *post*, p. 237.

Paul M. Smith argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 07–25 were *Sam Hirsch*, *William R. Groth*, and *Joseph E. Sandler*. *Kenneth J. Falk*, *Jacquelyn Bowie Suess*, *Laughlin McDonald*, *Neil T. Bradley*, *Steven R. Shapiro*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Angela Ciccolo*, and *Victor L. Goode* filed briefs for petitioners in No. 07–21.

Thomas M. Fisher, Solicitor General of Indiana, argued the cause for respondents in both cases. With him on the brief for the state respondents were *Steve Carter*, Attorney General, and *Julie A. Brubaker* and *Heather L. Hagan*, Deputy Attorneys General. *Jon Laramore* and *James B. Osborn* filed a brief for respondent Marion County Election Board.

Counsel

Solicitor General Clement argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Assistant Attorney General Becker*, *Deputy Solicitor General Garre*, *Douglas Hallward-Driemeier*, *Diana K. Flynn*, and *Christy A. McCormick*.†

†Briefs of *amici curiae* urging reversal in both cases were filed for the Asian American Legal Defense and Education Fund et al. by *Jonathan P. Gay* and *Kenneth Kimerling*; for the Brennan Center for Justice et al. by *Sidney S. Rosdeitcher* and *Wendy R. Weiser*; for Current and Former State Secretaries of State by *Daniel F. Kolb*; for the Cyber Privacy Project et al. by *Jonathan Albano*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg*; for Historians et al. by *J. Gerald Hebert*, *Paul S. Ryan*, and *Charles J. Ogletree, Jr.*; for the Lawyers' Committee for Civil Rights Under Law et al. by *Walter E. Dellinger*, *Sri Srinivasan*, *Jon M. Greenbaum*, and *Michael L. Murphy*; for the Mexican American Legal Defense and Educational Fund by *Matthew M. Shors*, *Michael C. Camuñez*, *John Trasviña*, and *Nina Perales*; for the NAACP Legal Defense and Educational Fund, Inc., by *Theodore M. Shaw*, *Jacqueline A. Berrien*, *Debo P. Adegbile*, *Ryan P. Haygood*, and *Kristen M. Clarke*; for the National Congress of American Indians et al. by *Vernle C. Durocher, Jr.*, and *Glenn M. Salvo*; for the National Law Center on Homelessness & Poverty et al. by *Carter G. Phillips* and *Edward R. McNicholas*; for Rock the Vote et al. by *Charles S. Sims* and *Emily Stern*; for the Rutherford Institute by *John W. Whitehead*; for R. Michael Alvarez et al. by *Samuel R. Bagenstos* and *Milton Sherman*; for Richard L. Hasen by *Mr. Hasen, pro se*; for Congressman Keith Ellison by *Gerard Treanor*; and for Senator Dianne Feinstein et al. by *Robert F. Bauer*.

Briefs of *amici curiae* urging reversal in No. 07–21 were filed for AARP et al. by *Patricia A. Brannan*, *Daniel B. Kohrman*, and *Michael R. Schuster*; and for the Asian American Justice Center et al. by *Mark A. Packman*, *Jonathan M. Cohen*, *Karen Narasaki*, *Vincent Eng*, and *Myron Quon*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *R. Ted Cruz*, Solicitor General, *Kent C. Sullivan*, First Assistant Attorney General, *David S. Morales*, Deputy Attorney General for Civil Litigation, and *Philip A. Lionberger*, Assistant Solicitor General, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado; *Bill McCollum* of Florida; *Mark J. Bennett* of Hawaii,

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

Referred to as either the "Voter ID Law" or "SEA 483,"[1] the statute applies to in-person voting at both primary and general elections. The requirement does not apply to ab-

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Michael A. Cox of Michigan, *Jon Bruning* of Nebraska, and *Lawrence E. Long* of South Dakota; for Georgia Secretary of State Karen C. Handel by *Thurbert E. Baker*, Attorney General of Georgia, *Dennis R. Dunn*, Deputy Attorney General, *Stefan E. Ritter*, Senior Assistant Attorney General, *Mark H. Cohen*, and *Anne W. Lewis*; for the American Civil Rights Union by *Peter J. Ferrara*; for the American Unity Legal Defense Fund by *Barnaby W. Zall*; for the Center for Equal Opportunity et al. by *John B. Nalbandian* and *Geoffrey Slaughter*; for the Conservative Party of New York State by *Martin S. Kaufman*; for Democrat and Republican Election Professionals by *Mark F. Hearne II*; for the Evergreen Freedom Foundation by *Michael J. Reitz*; for the Lawyers Democracy Fund by *Charles H. Bell, Jr.*, *Harvey M. Tettlebaum*, and *Mark G. Arnold*; for the Mountain States Legal Foundation by *William Perry Pendley*; for the Republican National Committee by *Thomas J. Josefiak*; for the Washington Legal Foundation by *Bert W. Rein*, *Daniel J. Popeo*, and *Richard A. Samp*; and for Doris Anne Sadler by *Wayne C. Turner* and *Michael R. Limrick*.

John H. Findley, *Sharon L. Browne*, and *Steven Geoffrey Gieseler* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging affirmance in No. 07–21.

Briefs of *amici curiae* were filed in both cases for the Association of Community Organizations for Reform Now by *David Overlock Stewart*; for the League of Women Voters of Indiana, Inc., et al. by *Karen Celestino-Horseman*, *Thomas N. Austin*, *Bruce G. Jones*, *Lewis J. Liman*, *Nelson A. Nettles*, and *Raymond L. Faust*; for Erwin Chemerinsky by *Richard W. Clary*; for Christopher S. Elmendorf et al. by *Daniel P. Tokaji*; for Senator Mitch McConnell et al. by *Mr. Hearne*; and for Dr. Frederic C. Schaffer et al. by *Bradley S. Phillips*.

[1] Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005.

sentee ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. Ind. Code Ann. §3–11–8–25.1(e) (West Supp. 2007). A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. §§3–11.7–5–1 (West Supp. 2007), 3–11.7–5–2.5(c) (West 2006).[2] A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit court clerk's office within 10 days. §3–11.7–5–2.5(b). No photo identification is required in order to register to vote,[3] and the State offers free photo identification to qualified voters able to establish their residence and identity. §9–24–16–10(b) (West Supp. 2007).[4]

Promptly after the enactment of SEA 483 in 2005, the Indiana Democratic Party and the Marion County Democratic Central Committee (Democrats) filed suit in the Federal District Court for the Southern District of Indiana against the

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[2] The affidavit must state that (1) the person executing the affidavit is the same individual who cast the provisional ballot on election day; and (2) the affiant is indigent and unable to obtain proof of identification without paying a fee or has a religious objection to being photographed. Ind. Code Ann. §3–11.7–5–2.5(c). If the election board determines that the challenge to the affiant was based solely on a failure to present photo identification, the "county election board shall . . . find that the voter's provisional ballot is valid." §3–11.7–5–2.5(d).

[3] Voters registering to vote for the first time in Indiana must abide by the requirements of the Help America Vote Act of 2002 (HAVA), 116 Stat. 1666, described *infra*, at 193.

[4] Indiana previously imposed a fee on all residents seeking a state-issued photo identification. At the same time that the Indiana Legislature enacted SEA 483, it also directed the Bureau of Motor Vehicles (BMV) to remove all fees for state-issued photo identification for individuals without a driver's license who are at least 18 years old. See 2005 Ind. Acts p. 2017, §18.

state officials responsible for its enforcement, seeking a judgment declaring the Voter ID Law invalid and enjoining its enforcement. A second suit seeking the same relief was brought on behalf of two elected officials and several nonprofit organizations representing groups of elderly, disabled, poor, and minority voters.[5] The cases were consolidated, and the State of Indiana intervened to defend the validity of the statute.

The complaints in the consolidated cases allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification. Second Amended Complaint in No. 1:05–CV–0634–SEB–VSS (SD Ind.), pp. 6–9.

After discovery, District Judge Barker prepared a comprehensive 70-page opinion explaining her decision to grant defendants' motion for summary judgment. 458 F. Supp. 2d 775 (SD Ind. 2006). She found that petitioners had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements." *Id.*, at 783. She rejected "as utterly incredible and unreliable" an expert's report that up to 989,000 registered voters in Indiana did not possess either a driver's license or other acceptable photo identification. *Id.*, at 803. She estimated that as of 2005, when the statute was enacted,

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[5] Specifically, the plaintiffs were William Crawford, Joseph Simpson, Concerned Clergy of Indianapolis, Indianapolis Resource Center for Independent Living, Indiana Coalition on Housing and Homeless Issues, Indianapolis Branch of the National Association for the Advancement of Colored People, and United Senior Action of Indiana. Complaint in No. 49D12050 4PL01 6207 (Super. Ct. Marion Cty., Ind., Apr. 28, 2005), p. 2.

around 43,000 Indiana residents lacked a state-issued driver's license or identification card. *Id.*, at 807.[6]

A divided panel of the Court of Appeals affirmed. 472 F. 3d 949 (CA7 2007). The majority first held that the Democrats had standing to bring a facial challenge to the constitutionality of SEA 483. Next, noting the absence of any plaintiffs who claimed that the law would deter them from voting, the Court of Appeals inferred that "the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls." *Id.*, at 952. It rejected the argument that the law should be judged by the same strict standard applicable to a poll tax because the burden on voters was offset by the benefit of reducing the risk of fraud. The dissenting judge, viewing the justification for the law as "hollow"—more precisely as "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic"—would have applied a stricter standard, something he described as "close to 'strict scrutiny light.'" *Id.*, at 954, 956 (opinion of Evans, J.). In his view, the "law imposes an undue burden on a recognizable segment of potential eligible voters" and therefore violates their rights under the First and Fourteenth Amendments to the Constitution. *Id.*, at 956–957.

Four judges voted to grant a petition for rehearing en banc. 484 F. 3d 436, 437 (CA7 2007) (Wood, J., dissenting from denial of rehearing en banc). Because we agreed with their assessment of the importance of these cases, we granted certiorari. 551 U. S. 1192 (2007). We are, however,

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[6]She added: "In other words, an estimated 99% of Indiana's voting age population already possesses the necessary photo identification to vote under the requirements of SEA 483." 458 F. Supp. 2d, at 807. Given the availability of free photo identification and greater public awareness of the new statutory requirement, presumably that percentage has increased since SEA 483 was enacted and will continue to increase in the future.

persuaded that the District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute, and thus affirm.[7]

I

In *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of $1.50. We rejected the dissenters' argument that the interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting provided a rational basis for the tax. See *id.*, at 685 (opinion of Harlan, J.). Applying a stricter standard, we concluded that a State "violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.*, at 666 (opinion of the Court). We used the term "invidiously discriminate" to describe conduct prohibited under that standard, noting that we had previously held that while a State may obviously impose "reasonable residence restrictions on the availability of the ballot," it "may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services." *Id.*, at 666–667 (citing *Carrington* v. *Rash*, 380 U. S. 89, 96 (1965)). Although the State's justification for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications.

Thus, under the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983), however, we confirmed the general rule that "evenhanded restrictions that protect the

[7] We also agree with the unanimous view of those judges that the Democrats have standing to challenge the validity of SEA 483 and that there is no need to decide whether the other petitioners also have standing.

integrity and reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper*. 460 U. S., at 788, n. 9. Rather than applying any "litmus test" that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the "hard judgment" that our adversary system demands.

In later election cases we have followed *Anderson*'s balancing approach. Thus, in *Norman* v. *Reed*, 502 U. S. 279, 288–289 (1992), after identifying the burden Illinois imposed on a political party's access to the ballot, we "called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation," and concluded that the "severe restriction" was not justified by a narrowly drawn state interest of compelling importance. Later, in *Burdick* v. *Takushi*, 504 U. S. 428 (1992), we applied *Anderson*'s standard for "'reasonable, nondiscriminatory restrictions,'" 504 U. S., at 434, and upheld Hawaii's prohibition on write-in voting despite the fact that it prevented a significant number of "voters from participating in Hawaii elections in a meaningful manner," *id.*, at 443 (KENNEDY, J., dissenting). We reaffirmed *Anderson*'s requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the "'precise interests put forward by the State as justifications for the burden imposed by its rule.'" 504 U. S., at 434 (quoting *Anderson*, 460 U. S., at 789).[8]

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[8] Contrary to JUSTICE SCALIA's suggestion, see *post*, at 204 (opinion concurring in judgment), our approach remains faithful to *Anderson* and *Burdick*. The *Burdick* opinion was explicit in its endorsement and adherence to *Anderson*, see 504 U. S., at 434, and repeatedly cited *Anderson*, see 504 U. S., at 436, n. 5, 440, n. 9, 441. To be sure, *Burdick* rejected the argument that strict scrutiny applies to all laws imposing a burden on the right to vote; but in its place, the Court applied the "flexible standard" set forth in *Anderson*. 504 U. S., at 434. *Burdick* surely did not create a novel "deferential 'important regulatory interests' standard." See *post*, at 204.

In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." *Norman*, 502 U. S., at 288–289. We therefore begin our analysis of the constitutionality of Indiana's statute by focusing on those interests.

II

The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential voters. While petitioners argue that the statute was actually motivated by partisan concerns and dispute both the significance of the State's interests and the magnitude of any real threat to those interests, they do not question the legitimacy of the interests the State has identified. Each is unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process.

The first is the interest in deterring and detecting voter fraud. The State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.[9] The State also argues that it has a particular interest in preventing voter fraud in response to a problem that is in part the product of its own maladministration—namely, that Indiana's voter registration rolls include a large number of names of persons who are either deceased or no longer live in Indiana. Finally, the State relies on its interest in safeguarding voter confidence. Each of these interests merits separate comment.

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[9]See National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process 18 (2002) (with honorary cochairs former Presidents Gerald Ford and Jimmy Carter).

Election Modernization

Two recently enacted federal statutes have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote.

In the National Voter Registration Act of 1993 (NVRA), 107 Stat. 77, 42 U. S. C. § 1973gg *et seq.*, Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process. § 1973gg. The statute requires state motor vehicle driver's license applications to serve as voter registration applications. § 1973gg–3. While that requirement has increased the number of registered voters, the statute also contains a provision restricting States' ability to remove names from the lists of registered voters. § 1973gg–6(a)(3). These protections have been partly responsible for inflated lists of registered voters. For example, evidence credited by Judge Barker estimated that as of 2004 Indiana's voter rolls were inflated by as much as 41.4%, see 458 F. Supp. 2d, at 793, and data collected by the Election Assistance Committee in 2004 indicated that 19 of 92 Indiana counties had registration totals exceeding 100% of the 2004 voting-age population, Dept. of Justice Complaint in *United States* v. *Indiana*, No. 1:06–cv–1000–RLY–TAB (SD Ind., June 27, 2006), p. 4, App. 313.

In HAVA, Congress required every State to create and maintain a computerized statewide list of all registered voters. 42 U. S. C. § 15483(a) (2000 ed., Supp. V). HAVA also requires the States to verify voter information contained in a voter registration application and specifies either an "applicant's driver's license number" or "the last 4 digits of the applicant's social security number" as acceptable verifications. § 15483(a)(5)(A)(i). If an individual has neither number, the State is required to assign the applicant a voter identification number. § 15483(a)(5)(A)(ii).

HAVA also imposes new identification requirements for individuals registering to vote for the first time who submit their applications by mail. If the voter is casting his ballot in person, he must present local election officials with written identification, which may be either "a current and valid photo identification" or another form of documentation such as a bank statement or paycheck. § 15483(b)(2)(A). If the voter is voting by mail, he must include a copy of the identification with his ballot. A voter may also include a copy of the documentation with his application or provide his driver's license number or Social Security number for verification. § 15483(b)(3). Finally, in a provision entitled "Fail-safe voting," HAVA authorizes the casting of provisional ballots by challenged voters. § 15483(b)(2)(B).

Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology. That conclusion is also supported by a report issued shortly after the enactment of SEA 483 by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which is a part of the record in these cases. In the introduction to their discussion of voter identification, they made these pertinent comments:

> "A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own

apartment building let alone their precinct, some form of identification is needed.

"There is no evidence of extensive fraud in U. S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." Building Confidence in U. S. Elections §2.5 (Sept. 2005), App. 136–137 (Carter-Baker Report) (footnote omitted).[10]

Voter Fraud

The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punish-

[10] The historical perceptions of the Carter-Baker Report can largely be confirmed. The average precinct size in the United States has increased in the last century, suggesting that it is less likely that pollworkers will be personally acquainted with voters. For example, at the time Joseph Harris wrote his groundbreaking 1934 report on election administration, Indiana restricted the number of voters in each precinct to 250. Election Administration in the United States 208 (Brookings Institution 1934). An Election Commission report indicates that Indiana's average number of registered voters per polling place is currently 1,014. Election Assistance Commission, Final Report of the 2004 Election Day Survey, ch. 13 (Sept. 2005) (Table 13) (hereinafter Final Report) (prepared by Election Data Services, Inc.), online at http://www.eac.gov/clearinghouse/clearinghouse/2004-election-day-survey (all Internet materials as visited Apr. 16, 2008, and available in Clerk of Court's case file). In 1930, the major cities that Harris surveyed had an average number of voters per precinct that ranged from 247 to 617. Election Administration in the United States, at 214. While States vary today, most have averages exceeding 1,000, with at least eight States exceeding 2,000 registered voters per polling place. Final Report, ch. 13 (Table 13).

ing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists,[11] that occasional examples have surfaced in recent years,[12] and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor[13]—though perpetrated using absentee ballots and not

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[11] Infamous examples abound in the New York City elections of the late 19th century, conducted under the influence of the Tammany Hall political machine. "Big Tim" Sullivan, a New York state senator and—briefly—a United States Congressman, insisted that his "repeaters" (individuals paid to vote multiple times) have whiskers:

"'When you've voted 'em with their whiskers on you take 'em to a barber and scrape off the chin-fringe. Then you vote 'em again with side lilacs and a moustache. Then to a barber again, off comes the sides and you vote 'em a third time with the moustache. If that ain't enough and the box can stand a few more ballots clean off the moustache and vote 'em plain face. That makes every one of 'em good for four votes.'" M. Werner, Tammany Hall 439 (1928).

[12] Judge Barker cited record evidence containing examples from California, Washington, Maryland, Wisconsin, Georgia, Illinois, Pennsylvania, Missouri, Miami, and St. Louis. The Brief for Brennan Center for Justice et al. as *Amici Curiae* in Support of Petitioners addresses each of these examples of fraud. While the brief indicates that the record evidence of in-person fraud was overstated because much of the fraud was actually absentee ballot fraud or voter registration fraud, there remain scattered instances of in-person voter fraud. For example, after a hotly contested gubernatorial election in 2004, Washington conducted an investigation of voter fraud and uncovered 19 "ghost voters." *Borders* v. *King Cty.*, No. 05–2–00027–3 (Super. Ct. Chelan Cty., Wash., June 6, 2005) (verbatim report of unpublished oral decision), 4 Election L. J. 418, 423 (2005). After a partial investigation of the ghost voting, one voter was confirmed to have committed in-person voting fraud. Le & Nicolosi, Dead Voted in Governor's Race, Seattle Post-Intelligencer, Jan. 7, 2005, p. A1.

[13] See *Pabey* v. *Pastrick*, 816 N. E. 2d 1138, 1151 (Ind. 2004) (holding that a special election was required because one candidate engaged in "a deliberate series of actions . . . making it impossible to determine the candidate who received the highest number of legal votes cast in the elec-

in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

In its brief, the State argues that the inflation of its voter rolls provides further support for its enactment of SEA 483. The record contains a November 5, 2000, newspaper article asserting that as a result of NVRA and "sloppy record-keeping," Indiana's lists of registered voters included the names of thousands of persons who had either moved, died, or were not eligible to vote because they had been convicted of felonies.[14] The conclusion that Indiana has an unusually inflated list of registered voters is supported by the entry of a consent decree in litigation brought by the Federal Government alleging violations of NVRA. Consent Decree and Order in *United States* v. *Indiana*, No. 1:06–cv–1000–RLY–TAB (SD Ind., June 27, 2006), App. 299–307. Even though Indiana's own negligence may have contributed to the serious inflation of its registration lists when SEA 483 was enacted, the fact of inflated voter rolls does provide a neutral

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tion"). According to the uncontested factual findings of the trial court, one of the candidates paid supporters to stand near polling places and encourage voters—especially those who were poor, infirm, or spoke little English—to vote absentee. The supporters asked the voters to contact them when they received their ballots; the supporters then "assisted" the voter in filling out the ballot.

[14] Theobald, Bogus Names Jam Indiana's Voter List, Indianapolis Star, Nov. 5, 2000, App. 145.

and nondiscriminatory reason supporting the State's decision to require photo identification.

Safeguarding Voter Confidence

Finally, the State contends that it has an interest in protecting public confidence "in the integrity and legitimacy of representative government." Brief for State Respondents 53. While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the "'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.'" *Supra*, at 194.

III

States employ different methods of identifying eligible voters at the polls. Some merely check off the names of registered voters who identify themselves; others require voters to present registration cards or other documentation before they can vote; some require voters to sign their names so their signatures can be compared with those on file; and in recent years an increasing number of States have relied primarily on photo identification.[15] A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to

[15] For a survey of state practice, see Brief for State of Texas et al. as *Amici Curiae* 10–14, and nn. 1–23.

cast a provisional ballot provides an adequate remedy for problems of that character.

The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483.[16] The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.[17]

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[16] Ind. Code Ann. §3–5–2–40.5 (West 2006) requires that the document satisfy the following:

"(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

"(2) The document shows a photograph of the individual to whom the document was issued.

"(3) The document includes an expiration date, and the document:

"(A) is not expired; or

"(B) expired after the date of the most recent general election.

"(4) The document was issued by the United States or the state of Indiana."

[17] To obtain a photo identification card a person must present at least one "primary" document, which can be a birth certificate, certificate of naturalization, U. S. veterans photo identification, U. S. military photo identification, or a U. S. passport. Ind. Admin. Code, tit. 140, §7–4–3 (2008), http://www.in.gov/legislative/iac/T01400/A00070.pdf?. Indiana, like most States, charges a fee for obtaining a copy of one's birth certificate. This fee varies by county and is currently between $3 and $12. See Indiana State Department of Health Web page, http://www.in.gov/isdh/bdcertifs/lhdfees/toc.htm. Some States charge substantially more. Affidavit of Robert Andrew Ford, App. 12.

Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of State, who may have difficulty obtaining a birth certificate;[18] persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters,[19] that

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[18] As petitioners note, Brief for Petitioners in No. 07–21, p. 17, n. 7, and the State's "Frequently Asked Questions" Web page states, it appears that elderly persons who can attest that they were never issued a birth certificate may present other forms of identification as their primary document to the Indiana BMV, including Medicaid/Medicare cards and Social Security benefits statements. http://www.in.gov/faqs.htm; see also Ind. Admin. Code, tit. 140, § 7–4–3(a) ("The commissioner or the commissioner's designee may accept reasonable alternate documents to satisfy the requirements of this rule").

[19] Presumably most voters casting provisional ballots will be able to obtain photo identifications before the next election. It is, however, difficult to understand why the State should require voters with a faith-based objection to being photographed to cast provisional ballots subject to later verification in every election when the BMV is able to issue these citizens special licenses that enable them to drive without any photo identification. See Ind. Code Ann. § 9–24–11–5(c) (West Supp. 2007).

conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

IV

Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion. Only a few weeks ago we held that the Court of Appeals for the Ninth Circuit had failed to give appropriate weight to the magnitude of that burden when it sustained a preelection, facial attack on a Washington statute regulating that State's primary election procedures. *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442 (2008). Our reasoning in that case applies with added force to the arguments advanced by petitioners in these cases.

Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

First, the evidence in the record does not provide us with the number of registered voters without photo identification; Judge Barker found petitioners' expert's report to be "utterly incredible and unreliable." 458 F. Supp. 2d, at 803. Much of the argument about the numbers of such voters comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court.

Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification. The record includes depositions of two case managers at a day shelter for homeless persons and the depositions of members of the plaintiff organizations, none of whom expressed a personal inability to vote under SEA 483. A deposition from a named plaintiff describes the difficulty the elderly woman had in obtaining an identification card, although her testimony indicated that she intended to return to the BMV since she had recently obtained her birth certificate and that she was able to pay the birth certificate fee. App. 94.

Judge Barker's opinion makes reference to six other elderly named plaintiffs who do not have photo identifications, but several of these individuals have birth certificates or were born in Indiana and have not indicated how difficult it would be for them to obtain a birth certificate. 458 F. Supp. 2d, at 797–799. One elderly named plaintiff stated that she had attempted to obtain a birth certificate from Tennessee, but had not been successful, and another testified that he did not know how to obtain a birth certificate from North Carolina. The elderly in Indiana, however, may have an easier time obtaining a photo identification card than the non-elderly, see n. 17, *supra*, and although it may not be a completely acceptable alternative, the elderly in Indiana are able to vote absentee without presenting photo identification.

The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed. While one elderly man stated that he did not have the money to pay for a birth certificate, when asked if he did not have the money or did not wish to spend it, he replied, "both." App. 211–212. From this limited evidence we do not know the magnitude of the impact SEA 483 will have on indigent voters in Indiana. The record does contain the affidavit of one homeless

woman who has a copy of her birth certificate, but was denied a photo identification card because she did not have an address. *Id.*, at 67. But that single affidavit gives no indication of how common the problem is.

In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. See *Storer* v. *Brown*, 415 U. S. 724, 738 (1974).[20] A facial challenge must fail where the statute has a "'"plainly legitimate sweep."'" *Washington State Grange*, 552 U. S., at 449 (citing and quoting *Washington* v. *Glucksberg*, 521 U. S. 702, 739–740, and n. 7 (1997) (STEVENS, J., concurring in judgments)). When we consider only the statute's broad

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[20] Three comments on JUSTICE SOUTER's speculation about the nontrivial burdens that SEA 483 may impose on "tens of thousands" of Indiana citizens, *post*, at 209 (dissenting opinion), are appropriate. First, the fact that the District Judge estimated that when the statute was passed in 2005, 43,000 citizens did not have photo identification, see 458 F. Supp. 2d 775, 807 (SD Ind. 2006), tells us nothing about the number of free photo identification cards issued since then. Second, the fact that public transportation is not available in some Indiana counties tells us nothing about how often elderly and indigent citizens have an opportunity to obtain a photo identification at the BMV, either during a routine outing with family or friends or during a special visit to the BMV arranged by a civic or political group such as the League of Women Voters or a political party. Further, nothing in the record establishes the distribution of voters who lack photo identification. To the extent that the evidence sheds any light on that issue, it suggests that such voters reside primarily in metropolitan areas, which are served by public transportation in Indiana (the majority of the plaintiffs reside in Indianapolis and several of the organizational plaintiffs are Indianapolis organizations). Third, the indigent, elderly, or disabled need not "travel all the way to their county seats every time they wish to vote," *post*, at 236, if they obtain a free photo identification card from the BMV. While it is true that obtaining a birth certificate carries with it a financial cost, the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates. Supposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication.

application to all Indiana voters we conclude that it "imposes only a limited burden on voters' rights." *Burdick*, 504 U. S., at 439. The "'precise interests'" advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483. *Id.*, at 434.

Finally we note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute. When evaluating a neutral, nondiscriminatory regulation of voting procedure, "[w]e must keep in mind that '"[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."' *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006) (quoting *Regan* v. *Time, Inc.*, 468 U. S. 641, 652 (1984) (plurality opinion))." *Washington State Grange*, 552 U. S., at 451.

V

In their briefs, petitioners stress the fact that all of the Republicans in the General Assembly voted in favor of SEA 483 and the Democrats were unanimous in opposing it.[21] In her opinion rejecting petitioners' facial challenge, Judge Barker noted that the litigation was the result of a partisan dispute that had "spilled out of the state house into the courts." 458 F. Supp. 2d, at 783. It is fair to infer that partisan considerations may have played a significant role in the decision to enact SEA 483. If such considerations had provided the only justification for a photo identification requirement, we may also assume that SEA 483 would suffer the same fate as the poll tax at issue in *Harper*.

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[21] Brief for Petitioners in No. 07–25, pp. 6–9. Fifty-two Republican House members voted for the bill, 45 Democrats voted against, and 3 Democrats were excused from voting. 3 Journal of the House of Representatives of the State of Indiana, Roll Call 259 (Mar. 21, 2005). In the Senate, 33 Republican Senators voted in favor and 17 Democratic Senators voted against. 3 Journal of the Senate of the State of Indiana, Roll Call 417 (Apr. 12, 2005).

But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting "the integrity and reliability of the electoral process." *Anderson*, 460 U. S., at 788, n. 9.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, concurring in the judgment.

The lead opinion assumes petitioners' premise that the voter-identification law "may have imposed a special burden on" some voters, *ante*, at 199, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny, *ante*, at 202–203. That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.

To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick* v. *Takushi*, 504 U. S. 428 (1992). This calls for application of a deferential "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. *Id.*, at 433–434 (internal quotation marks omitted). The lead opinion resists the import of *Burdick* by characterizing it as simply adopting "the balancing approach" of *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983) (majority opinion of STEVENS, J.). See *ante*, at 190; see also *ibid.*, n. 8. Although

Burdick liberally quoted *Anderson*, *Burdick* forged *Anderson*'s amorphous "flexible standard" into something resembling an administrable rule. See *Burdick*, *supra*, at 434. Since *Burdick*, we have repeatedly reaffirmed the primacy of its two-track approach. See *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 358 (1997); *Clingman* v. *Beaver*, 544 U. S. 581, 586–587 (2005). "[S]trict scrutiny is appropriate only if the burden is severe." *Id.*, at 592. Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring "nominal effort" of everyone, are not severe. See *id.*, at 591, 593–597. Burdens are severe if they go beyond the merely inconvenient. See *Storer* v. *Brown*, 415 U. S. 724, 728–729 (1974) (characterizing the law in *Williams* v. *Rhodes*, 393 U. S. 23 (1968), as "severe" because it was "so burdensome" as to be "'virtually impossible'" to satisfy).

Of course, we have to identify a burden before we can weigh it. The Indiana law affects different voters differently, *ante*, at 198–199, but what petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters. To vote in person in Indiana, *everyone* must have and present a photo identification that can be obtained for free. The State draws no classifications, let alone discriminatory ones, except to establish *optional* absentee and provisional balloting for certain poor, elderly, and institutionalized voters and for religious objectors. Nor are voters who already have photo identifications exempted from the burden, since those voters must maintain the accuracy of the information displayed on the identifications, renew them before they expire, and replace them if they are lost.

The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes. In the course of concluding that the Hawaii laws at issue in *Burdick* "im-

pose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote," 504 U. S., at 439, we considered the laws and their reasonably foreseeable effect on *voters generally*. See *id.*, at 436–437. We did not discuss whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances. That was essentially the approach of the *Burdick* dissenters, who would have applied strict scrutiny to the laws because of their effect on "some voters." See *id.*, at 446 (opinion of KENNEDY, J.); see also *id.*, at 448 ("The majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon *some individual voters* . . . " (emphasis added)). Subsequent cases have followed *Burdick*'s generalized review of nondiscriminatory election laws. See, *e. g.*, *Timmons*, *supra*, at 361–362; *Clingman*, 544 U. S., at 590–591 (plurality opinion); *id.*, at 592–593 (opinion of the Court). Indeed, *Clingman*'s holding that burdens are not severe if they are ordinary and widespread would be rendered meaningless if a single plaintiff could claim a severe burden.

Not all of our decisions predating *Burdick* addressed whether a challenged voting regulation severely burdened the right to vote, but when we began to grapple with the magnitude of burdens, we did so categorically and did not consider the peculiar circumstances of individual voters or candidates. See, *e. g.*, *Jenness* v. *Fortson*, 403 U. S. 431, 438–441 (1971). Thus, in *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), we did not link the State's interest in inhibiting party raiding with the petitioners' own circumstances. See *id.*, at 760–762. And in *Storer* v. *Brown*, *supra*, we observed that the severity of the burden of a regulation should be measured according to its "nature, extent, and *likely impact*." *Id.*, at 738 (emphasis added). We therefore instructed the District Court to decide on remand whether "a *reasonably diligent* independent candidate [could] be expected to satisfy the signature requirements, or will it be

only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.*, at 742 (emphasis added). Notably, we did not suggest that the District Court should consider whether one of the petitioners would actually find it more difficult than a reasonably diligent candidate to obtain the required signatures. What mattered was the general assessment of the burden.

Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, see *Anderson*, 460 U. S., at 786, n. 7, weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. See, *e. g.*, *Washington* v. *Davis*, 426 U. S. 229, 248 (1976). The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class. A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected.* See *Harris* v. *McRae*, 448 U. S. 297, 323, and n. 26 (1980) (poverty); *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 442 (1985) (disability); *Gregory* v. *Ashcroft*, 501 U. S. 452, 473 (1991) (age); cf. *Employment Div., Dept. of Human Re-*

*A number of our early right-to-vote decisions, purporting to rely upon the Equal Protection Clause, strictly scrutinized nondiscriminatory voting laws requiring the payment of fees. See, *e. g.*, *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 670 (1966) (poll tax); *Bullock* v. *Carter*, 405 U. S. 134, 145 (1972) (ballot-access fee); *Lubin* v. *Panish*, 415 U. S. 709, 716–719 (1974) (ballot-access fee). To the extent those decisions continue to stand for a principle that *Burdick* v. *Takushi*, 504 U. S. 428 (1992), does not already encompass, it suffices to note that we have never held that legislatures must calibrate *all* election laws, even those totally unrelated to money, for their impacts on poor voters or must otherwise accommodate wealth disparities.

sources of Ore. v. *Smith*, 494 U. S. 872, 878–879 (1990) (First Amendment does not require exceptions for religious objectors to neutral rules of general applicability).

Even if I thought that *stare decisis* did not foreclose adopting an individual-focused approach, I would reject it as an original matter. This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.

That sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States. See Art. I, §4. It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class. Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose is too severe.

The lead opinion's record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned. There is no good reason to prefer that course.

* * *

The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not "even represent a significant increase over the usual burdens of voting." *Ante*, at 198. And the State's interests, *ante*, at 191–197, are sufficient to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

Indiana's "Voter ID Law"[1] threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens, see *ante*, at 198–199 (lead opinion), and a significant percentage of those individuals are likely to be deterred from voting, see *ante*, at 199. The statute is unconstitutional under the balancing standard of *Burdick* v. *Takushi*, 504 U. S. 428 (1992): a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, see *ante*, at 191–197, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried. I therefore respectfully dissent from the Court's judgment sustaining the statute.[2]

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[1] Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005.

[2] I agree with the lead opinion that the petitioners in No. 07–25 have standing and that we therefore need not determine whether the remaining petitioners also have standing. See *ante*, at 189, n. 7.

I

Voting-rights cases raise two competing interests, the one side being the fundamental right to vote. See *Burdick*, *supra*, at 433 ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure'" (quoting *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 184 (1979))); see also *Purcell* v. *Gonzalez*, 549 U. S. 1, 3–4 (2006) *(per curiam)*; *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972); *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886). The Judiciary is obliged to train a skeptical eye on any qualification of that right. See *Reynolds*, *supra*, at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized").

As against the unfettered right, however, lies the "[c]ommon sense, as well as constitutional law . . . that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick*, *supra*, at 433 (quoting *Storer* v. *Brown*, 415 U. S. 724, 730 (1974)); see also *Burdick*, 504 U. S., at 433 ("Election laws will invariably impose some burden upon individual voters").

Given the legitimacy of interests on both sides, we have avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue. And whatever the claim, the Court has long made a careful, ground-level appraisal both of the practical burdens on the right to vote and of the State's reasons for imposing those precise burdens. Thus, in *Burdick:*

> "A court considering [such] a challenge . . . must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

> Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.*, at 434 (quoting *Anderson* v. *Celebrezze*, 460 U. S. 780, 789 (1983)).

The lead opinion does not disavow these basic principles. See *ante*, at 190–191 (discussing *Burdick*); see also *ante*, at 191 ("However slight [the] burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation" (internal quotation marks omitted)). But I think it does not insist enough on the hard facts that our standard of review demands.

II

Under *Burdick*, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," 504 U. S., at 434, upon an assessment of the "'character and magnitude of the asserted [threatened] injury,'" *ibid.* (quoting *Anderson*, *supra*, at 789), and an estimate of the number of voters likely to be affected.

A

The first set of burdens shown in these cases is the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law.[3] The travel is required for

[3] Under Indiana's law, an ID does not qualify as proof of identification unless it "satisfies all [of] the following":

"(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

"(2) The document shows a photograph of the individual to whom the document was issued.

[Footnote 3 is continued on p. 212]

the personal visit to a license branch of the Indiana Bureau of Motor Vehicles (BMV), which is demanded of anyone applying for a driver's license or nondriver photo identification. See 458 F. Supp. 2d 775, 791 (SD Ind. 2006). The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive,[4] witness the fact that the BMV

"(3) The document includes an expiration date, and the document:

"(A) is not expired; or

"(B) expired after the date of the most recent general election.

"(4) The document was issued by the United States or the state of Indiana." Ind. Code Ann. §3–5–2–40.5 (West 2006).

[4]The State asserts that the elderly and disabled are adequately accommodated through their option to cast absentee ballots, and so any burdens on them are irrelevant. See Brief for State Respondents 41. But as petitioners' *amici* AARP and the National Senior Citizens Law Center point out, there are crucial differences between the absentee and regular ballot. Brief for AARP et al. as *Amici Curiae* 12–16. Voting by absentee ballot leaves an individual without the possibility of receiving assistance from pollworkers, and thus increases the likelihood of confusion and error. More seriously, as the Supreme Court of Indiana has recognized, Indiana law "treats absentee voters differently from the way it treats Election Day voters," in the important sense that "an absentee ballot may not be recounted in situations where clerical error by an election officer rendered it invalid." *Horseman* v. *Keller*, 841 N. E. 2d 164, 171 (2006). The State itself notes that "election officials routinely reject absentee ballots on suspicion of forgery." Brief for State Respondents 62. The record indicates that voters in Indiana are not unaware of these risks. One elderly affiant in the District Court testified: "I don't trust [the absentee] system. . . . Because a lot of soldiers vote like that and their votes wasn't counted in the last election according to what I read, absentee." App. 209 (deposition of David Harrison).

It is one thing (and a commendable thing) for the State to make absentee voting available to the elderly and disabled; but it is quite another to suggest that, because the more convenient but less reliable absentee ballot is available, the State may freely deprive the elderly and disabled of the option of voting in person.

has far fewer license branches in each county than there are voting precincts.[5] Marion County, for example, has over 900 active voting precincts, see Brief for Respondent Marion County Election Board 4,[6] yet only 12 BMV license branches;[7] in Lake County, there are 565 active voting precincts, see n. 6, *supra*, to match up with only 8 BMV locations;[8] and Allen County, with 309 active voting precincts, see *ibid.*, has only 3 BMV license branches.[9] The same pattern holds in counties with smaller populations. Brown County has 12 active voter precincts, see *ibid.*, and only 1 BMV office;[10] while there were 18 polling places available in Fayette County's 2007 municipal primary,[11] there was only 1 BMV license branch;[12] and Henry County, with 42 polling places approved for 2008 elections,[13] has only 1 BMV office.

The burden of traveling to a more distant BMV office rather than a conveniently located polling place is probably

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[5] Under Indiana law, county executives must locate a polling place within five miles of the closest boundary of each voting precinct, and, with limited exceptions, no precinct may cover more than 1,200 active voters at the time it is established. See Brief for Respondent Marion County Election Board 3 (citing Ind. Code Ann. §§3–11–8–3(b), 3–11–1.5–3). The result is that the number of polling places tends to track the number of voting precincts in a county. In Henry County, for example, there are 42 active precincts, see n. 6, *infra*, and 42 polling places have been approved for the 2008 elections, see n. 13, *infra*.

[6] See also Count of Active Precincts by County, online at http://www.in.gov/sos/pdfs/Precincts_by_County_and_State_022706.pdf (all Internet materials as visited Apr. 21, 2008, and available in Clerk of Court's case file).

[7] See Marion County License Branches, http://www.in.gov/bmv/3134.htm.

[8] See Lake County, http://www.in.gov/bmv/3150.htm.

[9] See Allen County, http://www.in.gov/bmv/2954.htm.

[10] See Brown County, http://www.in.gov/bmv/3302.htm.

[11] See http://www.co.fayette.in.us/2007%20polling_locations_munic.htm.

[12] See Fayette County, http://www.in.gov/bmv/3246.htm.

[13] See News Release, Henry County, Indiana, Polling Places Approved for the 2008 Elections, http://www.henryco.net/cm/node/52.

serious for many of the individuals who lack photo identification.[14] They almost certainly will not own cars, see Brief for Current and Former State Secretaries of State as *Amici Curiae* 11, and public transportation in Indiana is fairly limited. According to a report published by Indiana's Department of Transportation in August 2007, 21 of Indiana's 92 counties have no public transportation system at all,[15] and as of 2000, nearly 1 in every 10 voters lived within 1 of these 21 counties.[16] Among the counties with some public system, 21 provide service only within certain cities, and 32 others restrict public transportation to regional county service,

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[14] The travel burdens might, in the future, be reduced to some extent by Indiana's commendable "BMV2You" mobile license branch, which will travel across the State for an average of three days a week, and provide BMV services (including ID services). See http://www.in.gov/bmv/3554.htm. The program does not count in my analysis, however, because the program was only recently opened in August 2007, see Indiana BMV Opens License Branch at State Fair, http://www.in.gov/newsroom.htm?detailContent=93_10400.htm, and its long-term service schedule has yet to be determined.

[15] Indiana Public Transit: Annual Report 2006, p. 29 (hereinafter Annual Report), http://www.in.gov/indot/files/INDOT_2006.pdf. The 21 counties with no public transportation, according to the study, are: Adams, Blackford, Brown, Carroll, Clay, De Kalb, Gibson, Jennings, Lagrange, Parke, Perry, Posey, Putnam, Rush, Spencer, Steuben, Tipton, Vermillion, Warren, Warrick, and Whitley. See *ibid.*

A Website of the American Public Transportation Association, which compiles public transit information across the States, confirms that each of those 21 counties lacks any public transportation offerings, and in fact adds another 13 counties to this category: Boone, Decatur, Fayette, Fulton, Hancock, Hendricks, Huntington, Miami, Morgan, Noble, Pike, Shelby, and Wells. See Transit Systems in Indiana, http://www.publictransportation.org/systems/state.asp?state=IN#A44. The discrepancy appears to arise, in part, from the fact that the American Public Transportation Association has not counted demand response systems that have been established in at least 6 of these 13 counties. See Annual Report 36, 50, 56, 96, 110, 144.

[16] In 2000, approximately 9% of Indiana's population lived within 1 of these 21 counties. See County and City Extra: Special Decennial Census Edition 169, 176 (D. Gaquin & K. DeBrandt eds. 2002).

leaving only 18 that offer countywide public transportation, see n. 15, *supra*. State officials recognize the effect that travel costs can have on voter turnout, as in Marion County, for example, where efforts have been made to "establis[h] most polling places in locations even more convenient than the statutory minimum," in order to "provid[e] for neighborhood voting." Brief for Respondent Marion County Election Board 3–4.

Although making voters travel farther than what is convenient for most and possible for some does not amount to a "severe" burden under *Burdick*, that is no reason to ignore the burden altogether. It translates into an obvious economic cost (whether in worktime lost, or getting and paying for transportation) that an Indiana voter must bear to obtain an ID.

For those voters who can afford the round trip, a second financial hurdle appears: in order to get photo identification for the first time, they need to present "a birth certificate, certificate of naturalization, U. S. veterans photo identification, U. S. military photo identification, or a U. S. passport." *Ante*, at 198, n. 17 (lead opinion) (citing Ind. Admin. Code, tit. 140, § 7–4–3 (2008)). As the lead opinion says, the two most common of these documents come at a price: Indiana counties charge anywhere from $3 to $12 for a birth certificate (and in some other States the fee is significantly higher), see *ante*, at 198, n. 17, and that same price must usually be paid for a first-time passport, since a birth certificate is required to prove U. S. citizenship by birth. The total fees for a passport, moreover, are up to about $100.[17] So most voters must pay at least one fee to get the ID necessary to cast

[17] See Dept. of State, How to Apply in Person for a Passport, http://travel.state.gov/passport/get/first/first_830.html; Dept. of State, Passport Fees (Feb. 1, 2008), http://travel.state.gov/passport/get/fees/fees_837.html (total fees of $100 for a passport book and $45 for a passport card for individuals 16 and older).

a regular ballot.[18] As with the travel costs, these fees are far from shocking on their face, but in the *Burdick* analysis it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.

B

To be sure, Indiana has a provisional-ballot exception to the ID requirement for individuals the State considers "indigent"[19] as well as those with religious objections to being photographed, see *ante*, at 199–200 (lead opinion), and this sort of exception could in theory provide a way around the costs of procuring an ID. But Indiana's chosen exception does not amount to much relief.

The law allows these voters who lack the necessary ID to sign the pollbook and cast a provisional ballot. See 458 F. Supp. 2d, at 786 (citing Ind. Code Ann. §3–11–8–25.1 (West Supp. 2007)). As the lead opinion recognizes, though, *ante*, at 199–200, that is only the first step; to have the provisional ballot counted, a voter must then appear in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed (or to present an

[18] The lead opinion notes that "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates." *Ante*, at 202, n. 20. But the record discloses no reason to think that any appreciable number of poor voters would need birth certificates absent the Voter ID Law, and no reason to believe that poor people would spend money to get them if they did not need them.

[19] To vote by provisional ballot, an individual must (at the circuit court clerk's office) sign an affidavit affirming that she is "indigent" and "unable to obtain proof of identification without the payment of a fee." Ind. Code Ann. §3–11.7–5–2.5(c)(2)(A) (West 2006). Indiana law does not define the key terms "indigent" or "unable," but I will assume for present purposes that the Indiana Supreme Court will eventually construe these terms broadly, so that the income threshold for indigency is at least at the federal poverty level, and so that the exception covers even individuals who are facing only short-term financial difficulties.

ID at that point),[20] see 458 F. Supp. 2d, at 786. Unlike the trip to the BMV (which, assuming things go smoothly, needs to be made only once every four years for renewal of non-driver photo identification, see *id.*, at 791), this one must be taken every time a poor person or religious objector wishes to vote, because the State does not allow an affidavit to count in successive elections. And unlike the trip to the BMV (which at least has a handful of license branches in the more populous counties), a county has only one county seat. Forcing these people to travel to the county seat every time they try to vote is particularly onerous for the reason noted already, that most counties in Indiana either lack public transportation or offer only limited coverage. See *supra*, at 213–215.

That the need to travel to the county seat each election amounts to a high hurdle is shown in the results of the 2007 municipal elections in Marion County, to which Indiana's Voter ID Law applied. Thirty-four provisional ballots were cast, but only two provisional voters made it to the county clerk's office within the 10 days. See Brief for Respondent Marion County Election Board 8–9. All 34 of these aspiring voters appeared at the appropriate precinct; 33 of them provided a signature, and every signature matched the one on file; and 26 of the 32 voters whose ballots were not counted had a history of voting in Marion County elections. See *id.*, at 9.

All of this suggests that provisional ballots do not obviate the burdens of getting photo identification. And even if that were not so, the provisional-ballot option would be inade-

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[20] Indiana law allows voters to cast a provisional ballot at the county clerk's office starting 29 days prior to election day until noon of the day prior to election day, see Ind. Code Ann. §3–11.7–5–2.5, and this might enable some voters to make only one burdensome trip to the county seat. But for the voters who show up at the polls to vote and are there told that they lack the photo identification needed to cast a regular ballot, the Voter ID Law effectively forces them to make two trips.

quate for a further reason: the indigency exception by definition offers no relief to those voters who do not consider themselves (or would not be considered) indigent but as a practical matter would find it hard, for nonfinancial reasons, to get the required ID (most obviously the disabled).

C

Indiana's Voter ID Law thus threatens to impose serious burdens on the voting right, even if not "severe" ones, and the next question under *Burdick* is whether the number of individuals likely to be affected is significant as well. Record evidence and facts open to judicial notice answer yes.

Although the District Court found that petitioners failed to offer any reliable empirical study of numbers of voters affected, see *ante*, at 200 (lead opinion),[21] we may accept that court's rough calculation that 43,000 voting-age residents lack the kind of identification card required by Indiana's law. See 458 F. Supp. 2d, at 807. The District Court made that estimate by comparing BMV records reproduced in petitioners' statistician's report with U. S. Census Bureau figures for Indiana's voting-age population in 2004, see *ibid.*, and the State does not argue that these raw data are unreliable.

The State, in fact, shows no discomfort with the District Court's finding that an "estimated 43,000 individuals" (about 1% of the State's voting-age population) lack a qualifying ID. Brief for State Respondents 25. If the State's willingness to take that number is surprising, it may be less so in light of the District Court's observation that "several factors . . . suggest the percentage of Indiana's voting age population with photo identification is actually lower than 99%," 458

[21] Much like petitioners' statistician, the BMV "has not been able to determine the approximate number of Indiana residents of voting age who are without an Indiana driver's license or identification card," 458 F. Supp. 2d 775, 791 (SD Ind. 2006), but the BMV does acknowledge "that there are persons who do not currently have [the required ID] and who are, or who will be, eligible to vote at the next election," *ibid.*

F. Supp. 2d, at 807, n. 43,[22] a suggestion in line with national surveys showing roughly 6%–10% of voting-age Americans without a state-issued photo identification card. See Brief for Petitioners in No. 07–21, pp. 39–40, n. 17 (citing National Commission on Election Reform, To Assure Pride and Confidence: Task Force Reports, ch. VI: Verification of Identity, p. 4 (Aug. 2001), http://webstorage3.mcpa.virginia.edu/commissions/comm_2001_taskforce.pdf). We have been offered no reason to think that Indiana does a substantially better job of distributing IDs than other States.[23]

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[22] The District Court explained:

"[O]ur simple comparison of raw numbers does not take into account: individuals who have died but whose Indiana driver's license or identification cards have not expired; individuals who have moved outside the state and no longer consider themselves Indiana residents but who still retain a valid Indiana license or identification card; individuals who have moved into Indiana and now consider themselves Indiana residents but have not yet obtained an Indiana license or identification; and individuals, such as students, who are residing in Indiana temporally, are registered to vote in another state, but have obtained an Indiana license or identification." *Id.*, at 807, n. 43.

The District Court also identified three factors that, in its view, might require deductions of the 43,000 figure. First, the District Court noted that BMV records do not cover all forms of identification that may be used to vote under the Voter ID Law (*e. g.*, federal photo identification, such as a passport). This is a valid consideration, but is unlikely to overcome the additions that must be made for the various factors listed above. Second, the court noted that the BMV records do not account for the exceptions to the photo identification requirement (such as the indigency and absentee-ballot exceptions). This factor does not warrant a deduction of the 43,000 number because, as I have argued, the indigency exception imposes serious burdens of its own, see *supra*, at 216–218, and the absentee-ballot exception is not a wholly adequate substitute for voting in person, see n. 4, *supra*. Finally, the District Court noted that many individuals are not registered to vote. For reasons I lay out in n. 24, *infra*, I am not convinced that this fact is relevant at all.

[23] Although the lead opinion expresses confidence that the percentage of voters without the necessary photo ID will steadily decrease, see *ante*, at 188, n. 6, and suggests that the number may already have dropped, see *ante*, at 202, n. 20, there is reason to be less sanguine. See ACLU Sues

So a fair reading of the data supports the District Court's finding that around 43,000 Indiana residents lack the needed identification, and will bear the burdens the law imposes. To be sure, the 43,000 figure has to be discounted to some extent, residents of certain nursing homes being exempted from the photo identification requirement. 458 F. Supp. 2d, at 786. But the State does not suggest that this narrow exception could possibly reduce 43,000 to an insubstantial number.[24]

The upshot is this. Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically,

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To Halt License Revocation, Fort Wayne J. Gazette, Feb. 9, 2008, p. 3C ("The American Civil Liberties Union is suing the state to prevent the possible revocation of up to 56,000 driver's licenses that don't match information in a Social Security database. Many of the mismatches were created by typographical errors or by people getting married and changing their last names, the [BMV] said last week when it announced it had sent warning letters to about 206,000 people in Indiana"); see also Dits, Court Date Is Set for Bid To Stop BMV Revoking Licenses, South Bend Tribune, Feb. 21, 2008, p. B1; Who To Blame in Name Game? Many Caught in Name Game; Merging BMV, Social Security Databases Forcing Many To Hire Lawyers, Post-Tribune, Jan. 8, 2008, p. A5; Snelling, Name Issue Blocks License, *id.*, Jan. 7, 2008, p. A6.

[24] The State does imply that we should further discount the 43,000 estimate to exclude citizens who are not registered to vote, or who are registered but not planning to vote. See Brief for State Respondents 25; see also *ante*, at 200 (lead opinion) ("[T]he evidence in the record does not provide us with the number of registered voters without photo identification"). But that argument is flatly contradicted by this Court's settled precedent. As our cases have recognized, disfranchisement is disfranchisement, whether or not the disfranchised voter would have voted if given the choice. That is why in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), the Court did not ask whether any significant number of individuals deprived of the right to vote by durational residence requirements would actually have chosen to vote. And in *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966), the Court did not pause to consider whether any of the qualified voters deterred by the $1.50 poll tax would have opted to vote if there had been no fee. Our cases make clear that the Constitution protects an individual's ability to vote, not merely his decision to do so.

see 472 F. 3d 949, 951 (CA7 2007) ("No doubt most people who don't have photo ID are low on the economic ladder"); cf. *Bullock* v. *Carter*, 405 U. S. 134, 144 (1972) ("[W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status").[25] The Voter ID Law places hurdles in the way of either getting an ID or of voting provisionally, and they translate into nontrivial economic costs. There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting. Cf. 458 F. Supp. 2d, at 823 ("We do not doubt that such individuals exist somewhere, even though Plaintiffs were unable to locate them"); 472 F. 3d, at 952 ("No doubt there are at least a few [whom the law will deter from voting] in Indiana . . . "); see also *ante*, at 199–200 (lead opinion).

Petitioners, to be sure, failed to nail down precisely how great the cohort of discouraged and totally deterred voters will be, but empirical precision beyond the foregoing numbers has never been demanded for raising a voting-rights claim. Cf. *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 461–462 (2008) (ROBERTS, C. J., concurring) ("Nothing in my analysis requires the parties to produce studies regarding voter perceptions on this score"); *Dunn*, 405 U. S., at 335, n. 5 ("[I]t would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence

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[25] Studies in other States suggest that the burdens of an ID requirement may also fall disproportionately upon racial minorities. See Overton, Voter Identification, 105 Mich. L. Rev. 631, 659 (2007) ("In 1994, the U. S. Department of Justice found that African-Americans in Louisiana were four to five times less likely than white residents to have government-sanctioned photo identification"); *id.*, at 659–660 (describing June 2005 study by the Employment and Training Institute at the University of Wisconsin-Milwaukee, which found that while 17% of voting-age whites lacked a valid driver's license, 55% of black males and 49% of black females were unlicensed, and 46% of Latino males and 59% of Latino females were similarly unlicensed).

requirements"); *Bullock*, *supra*, at 144 (taking account of "the obvious likelihood" that candidate filing fees would "fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs"). While of course it would greatly aid a plaintiff to establish his claims beyond mathematical doubt, he does enough to show that serious burdens are likely.

Thus, petitioners' case is clearly strong enough to prompt more than a cursory examination of the State's asserted interests. And the fact that Indiana's photo identification requirement is one of the most restrictive in the country, see Brief for Current and Former State Secretaries of State as *Amici Curiae* 27–30 (compiling state voter-identification statutes); see also Brief for State of Texas et al. as *Amici Curiae* 10–13 (same),[26] makes a critical examination of the

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[26] Unlike the Help America Vote Act of 2002, 116 Stat. 1666, 42 U. S. C. § 15301 *et seq.* (2000 ed., Supp. V), which generally requires proof of identification but allows for a variety of documents to qualify, see *ante*, at 192–193 (lead opinion), Indiana accepts only limited forms of federally issued or state-issued photo identification, see n. 3, *supra*, and does not allow individuals lacking the required identification to cast a regular ballot at the polls. Only one other State, Georgia, currently restricts voters to the narrow forms of government-issued photo identification. See Ga. Code Ann. § 21–2–417 (Supp. 2007). But a birth certificate is not needed to get a Georgia voter identification card. See § 21–2–417.1; Ga. Comp. Rules & Regs., Rule 183–1–20.01 (2006).

Missouri's Legislature passed a restrictive photo identification law comparable to Indiana's, but the Missouri Supreme Court struck it down as violative of the State Constitution. *Weinschenk* v. *State*, 203 S. W. 3d 201 (2006) *(per curiam)*. Florida requires photo identification, but permits the use of several forms, including a debit or credit card; military identification; student identification; retirement center identification; neighborhood association identification; and public assistance identification. See Fla. Stat. Ann. § 101.043(1) (West Supp. 2008). Moreover, a Florida voter who lacks photo identification may cast a provisional ballot, and that ballot will be counted so long as the signature on the ballot matches the one on the voter's registration. §§ 101.043(2), 101.048.

All other States that require identification at the polls either allow voters to identify themselves using a variety of documents, see Ala. Code

State's claims all the more in order. Cf. *Randall* v. *Sorrell*, 548 U. S. 230, 253 (2006) (plurality opinion) (citing as a "danger sig[n]" that "contribution limits are substantially lower than . . . comparable limits in other States," and concluding that "[w]e consequently must examine the record independently and carefully to determine whether [the] limits are 'closely drawn' to match the State's interests"); *id.*, at 284, 288 (SOUTER, J., dissenting) (finding that deference was appropriate on the reasoning that limits were "consistent with limits set by the legislatures of many other States, all of them with populations larger than Vermont's," and that "[t]he Legislature of Vermont evidently tried to account for the realities of campaigning in Vermont").

III

Because the lead opinion finds only "limited" burdens on the right to vote, see *ante*, at 202–203, it avoids a hard look at the State's claimed interests. See *ante*, at 191–197. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' [and] 'the extent to which those inter-

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§ 17–9–30 (2007); Alaska Stat. § 15.15.225 (2006); Ariz. Rev. Stat. Ann. § 16–579 (West 2006); Ark. Code Ann. § 7–5–305(a)(8) (2007); Colo. Rev. Stat. §§ 1–1–104(19.5), 1–7–110 (2007); Ky. Rev. Stat. Ann. § 117.227 (Lexis 2004); Mont. Code Ann. § 13–13–114 (2007); N. M. Stat. Ann. §§ 1–1–24, 1–12–7.1, as amended by 2008 N. M. Laws ch. 59; N. M. Stat. Ann. § 1–12–8 (Cum. Supp. 2007); Ohio Rev. Code Ann. §§ 3503.16(B)(1), 3505.18 (Lexis Supp. 2007); S. C. Code Ann. §§ 7–5–125, 7–13–710 (Cum. Supp. 2007); Tenn. Code Ann. § 2–7–112 (2003); Tex. Elec. Code Ann. §§ 63.001–63.009 (West 2003 and Supp. 2007); § 63.0101 (West Supp. 2007); Wash. Rev. Code § 29A.44.205 (2006), or allow voters lacking identification to cast a regular ballot upon signing an affidavit (or providing additional identifying information), see Conn. Gen. Stat. § 9–261 (2007); Del. Code Ann., Tit. 15, § 4937 (2007); Haw. Rev. Stat. § 11–136 (2006 Cum. Supp.); La. Stat. Ann. § 18:562 (West Supp. 2008); Mich. Comp. Laws Ann. § 168.523(1) (West Supp. 2007); N. D. Cent. Code Ann. § 16.1–05–07 (Lexis Supp. 2007); S. D. Codified Laws §§ 12–18–6.1, 12–18–6.2 (2004); Va. Code Ann. § 24.2–643 (Lexis 2006).

ests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U. S., at 434 (quoting *Anderson*, 460 U. S., at 789).

As this quotation from *Burdick* indicates, the interests claimed to justify the regulatory scheme are subject to discount in two distinct ways. First, the generalities raised by the State have to be shaved down to the precise "aspect[s of claimed interests] addressed by the law at issue." *California Democratic Party* v. *Jones*, 530 U. S. 567, 584 (2000) (emphasis deleted); see *ibid.* (scrutiny of state interests "is not to be made in the abstract, by asking whether [the interests] are highly significant values; but rather by asking whether the *aspect* of [those interests] addressed by the law at issue is highly significant" (emphasis in original)). And even if the State can show particularized interests addressed by the law, those interests are subject to further discount depending on "the extent to which [they] make it necessary to burden the plaintiff's rights." *Burdick*, *supra*, at 434 (internal quotation marks omitted).

As the lead opinion sees it, the State has offered four related concerns that suffice to justify the Voter ID Law: modernizing election procedures, combating voter fraud, addressing the consequences of the State's bloated voter rolls, and protecting public confidence in the integrity of the electoral process. See *ante*, at 191–197. On closer look, however, it appears that the first two (which are really just one) can claim modest weight at best, and the latter two if anything weaken the State's case.

A

The lead opinion's discussion of the State's reasons begins with the State's asserted interests in "election modernization," *ante*, at 192–197, and in combating voter fraud, see *ante*, at 194–197. Although these are given separate headings, any line drawn between them is unconvincing; as I un-

derstand it, the "effort to modernize elections," Brief for State Respondents 12, is not for modernity's sake, but to reach certain practical (or political) objectives.[27] In any event, if a proposed modernization were in fact aimless, if it were put forward as change for change's sake, a State could not justify any appreciable burden on the right to vote that might ensue; useless technology has no constitutional value. And in fact that is not the case here. The State says that it adopted the ID law principally to combat voter fraud, and it is this claim, not the slogan of "election modernization," that warrants attention.

1

There is no denying the abstract importance, the compelling nature, of combating voter fraud. See *Purcell*, 549 U. S., at 4 (acknowledging "the State's compelling interest in preventing voter fraud"); cf. *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process"). But it takes several steps to get beyond the level of abstraction here.

To begin with, requiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. The photo identification requirement leaves untouched the problems of absentee-ballot fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana, see 458 F. Supp. 2d, at 793; of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot stuffing, ballot miscounting, voter

[27] See generally R. Saltman, The History and Politics of Voting Technology: In Quest of Integrity and Public Confidence (2006) (tracing the history of changes in methods of voting in the United States, and the social and political considerations behind them).

intimidation, or any other type of corruption on the part of officials administering elections. See Brief for Brennan Center for Justice et al. as *Amici Curiae* 7.

And even the State's interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. See 458 F. Supp. 2d, at 792–793; see also *ante*, at 194–197 (lead opinion). Neither the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud in the State. See 458 F. Supp. 2d, at 793. This absence of support is consistent with the experience of several veteran poll watchers in Indiana, each of whom submitted testimony in the District Court that he had never witnessed an instance of attempted voter impersonation fraud at the polls. *Ibid.* It is also consistent with the dearth of evidence of in-person voter impersonation in any other part of the country. See *ante*, at 195, n. 12 (lead opinion) (conceding that there are at most "scattered instances of in-person voter fraud"); see also Brief for Brennan Center for Justice, *supra*, at 11–25 (demonstrating that "the national evidence—including the very evidence relied on by the courts below—suggests that the type of voting fraud that may be remedied by a photo identification requirement is virtually nonexistent: the 'problem' of voter impersonation is not a real problem at all").[28]

The State responds to the want of evidence with the assertion that in-person voter impersonation fraud is hard to de-

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[28] The lack of evidence of in-person voter impersonation fraud is not for failure to search. See, *e. g.*, Lipton & Urbina, In 5-Year Effort, Scant Evidence of Voter Fraud, N. Y. Times, Apr. 12, 2007, p. A1 ("Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews").

tect. But this is like saying the "man who wasn't there" is hard to spot,[29] and to know whether difficulty in detection accounts for the lack of evidence one at least has to ask whether in-person voter impersonation is (or would be) relatively harder to ferret out than other kinds of fraud (*e. g.*, by absentee ballot) which the State has had no trouble documenting. The answer seems to be no; there is reason to think that "impersonation of voters is . . . the most likely type of fraud to be discovered." U. S. Election Assistance Commission, Election Crimes: An Initial Review and Recommendations for Future Study 9 (Dec. 2006) (hereinafter EAC Report), http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file. This is in part because an individual who impersonates another at the polls commits his fraud in the open, under the scrutiny of local pollworkers who may well recognize a fraudulent voter when they hear who he claims to be. See Brief for Respondent Marion County Election Board 6 ("[P]recinct workers may recognize an imposter, and precinct election workers have the authority to challenge persons appearing to vote if the election board member 'is not satisfied that a person who offers to vote is the person who the person represents the person to be'" (quoting Ind. Code Ann. §3–11–8–27 (West 2006))).

The relative ease of discovering in-person voter impersonation is also owing to the odds that any such fraud will be committed by "organized groups such as campaigns or political parties" rather than by individuals acting alone. L. Minnite & D. Callahan, Securing the Vote: An Analysis of Election Fraud 14 (2003), http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf. It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few

[29] "As I was going up the stair / I met a man who wasn't there." H. Mearns, Antigonish, reprinted in Best Remembered Poems 107 (M. Gardner ed. 1992).

who may commit it. If an imposter gets caught, he is subject to severe criminal penalties. See, *e. g.*, Ind. Code Ann. §3–14–2–9 (West 2006) (making it a felony "knowingly [to] vot[e] or offe[r] to vote at an election when the person is not registered or authorized to vote"); §3–14–2–11 (with certain exceptions, "a person who knowingly votes or offers to vote in a precinct except the one in which the person is registered and resides" commits a felony); §3–14–2–12(1) (making it a felony "knowingly [to] vot[e] or mak[e] application to vote in an election in a name other than the person's own"); §3–14–2–12(2) (a person who, "having voted once at an election, knowingly applies to vote at the same election in the person's own name or any other name" commits a felony); see also 42 U. S. C. §1973i(e)(1) (any individual who "votes more than once" in certain federal elections "shall be fined not more than $10,000 or imprisoned not more than five years, or both"). And even if he succeeds, the imposter gains nothing more than one additional vote for his candidate. See EAC Report 9 (in-person voter impersonation "is an inefficient method of influencing an election"); J. Levitt, The Truth About Voter Fraud 7 (2007), online at http://truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf ("[F]raud by individual voters is a singularly foolish and ineffective way to attempt to win an election. Each act of voter fraud in connection with a federal election risks five years in prison and a $10,000 fine, in addition to any state penalties. In return, it yields at most one incremental vote. That single extra vote is simply not worth the price" (footnote omitted)); cf. 472 F. 3d, at 951 ("[A] vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote" (emphasis in original)).

In sum, fraud by individuals acting alone, however difficult to detect, is unlikely. And while there may be greater incentives for organized groups to engage in broad-gauged in-

person voter impersonation fraud, see Minnite & Callahan, *supra*, at 20, it is also far more difficult to conceal larger enterprises of this sort. The State's argument about the difficulty of detecting the fraud lacks real force.

2

Nothing else the State has to say does much to bolster its case. The State argues, for example, that even without evidence of in-person voter impersonation in Indiana, it is enough for the State to show that "opportunities [for such fraud] are transparently obvious in elections without identification checks," Brief for State Respondents 54. Of course they are, but Indiana elections before the Voter ID Law were not run "without identification checks"; on the contrary, as the Marion County Election Board informs us, "[t]ime-tested systems were in place to detect in-person voter impersonation fraud before the challenged statute was enacted," Brief for Respondent Marion County Election Board 6. These included hiring pollworkers who were precinct residents familiar with the neighborhood and making signature comparisons, each effort being supported by the criminal provisions mentioned before. *Id.*, at 6–8.

For that matter, the deterrence argument can do only so much work, since photo identification is itself hardly a fail-safe against impersonation. Indiana knows this, and that is why in 2007 the State began to issue redesigned driver's licenses with digital watermarking.[30] The State has made this shift precisely because, in the words of its BMV, "visual inspection is not adequate to determine the authenticity" of driver's licenses. See Indiana BMV, *supra* n. 30. Indeed, the BMV explains that the digital watermark (which can be scanned using equipment that, so far, Indiana does not use

[30] See Indiana BMV, Digital Drivers License: Frequently Asked Questions, "What is a digital watermark and why is Indiana incorporating it into their driver license?", http://www.in.gov/bmv/3382.htm.

at polling places) is needed to "tak[e] the guesswork out of inspection." *Ibid.*[31] So, at least until polling places have the machines and special software to scan the new driver's licenses, and until all the licenses with the older designs expire (the licenses issued after 2006 but before the 2007 redesigning are good until 2012, see 458 F. Supp. 2d, at 791), Indiana's law does no more than ensure that any in-person voter fraud will take place with fake IDs, not attempted signature forgery.

Despite all this, I will readily stipulate that a State has an interest in responding to the risk (however small) of in-person voter impersonation. See *ante*, at 196 (lead opinion). I reach this conclusion, like others accepted by the Court, because "'[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments.'" *Randall*, 548 U. S., at 285 (SOUTER, J., dissenting) (quoting *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 402 (2000) (BREYER, J., concurring)). Weight is owed to the legislative judgment as such. But the ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it (certainly when the law is one of the most restrictive of its kind, see n. 26, *supra*), and on this record it would be unreasonable to accord this assumed state interest more than very modest significance.[32]

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[31] In the words of Indiana's Governor, Mitch Daniels: "'Not very long ago, Indiana driver's licenses were a late-night talk show joke [because of] the ease of their fraudulent issuance and also their duplication . . . . [The new design] will make particularly their duplication dramatically more difficult.'" Udell, Digital Driver's Licenses Designed To Stem ID Theft, Evansville Courier & Press, June 7, 2007, p. B6.

[32] On such flimsy evidence of fraud, it would also ignore the lessons of history to grant the State's interest more than modest weight, as the interest in combating voter fraud has too often served as a cover for unnecessarily restrictive electoral rules. See F. Ogden, The Poll Tax in the South 9 (1958) ("In Arkansas and Texas, the argument was frequently presented

The antifraud rationale is open to skepticism on one further ground, what *Burdick* spoke of as an assessment of the degree of necessity for the State's particular course of action. Two points deserve attention, the first being that the State has not even tried to justify its decision to implement the photo identification requirement immediately on passage of the new law. A phase-in period would have given the State time to distribute its newly designed licenses, and to make a genuine effort to get them to individuals in need, and a period for transition is exactly what the Commission on Federal Election Reform, headed by former President Carter and former Secretary of State Baker, recommended in its report. See Building Confidence in U. S. Elections §2.5 (Sept. 2005), App. 136, 140 (hereinafter Carter-Baker Report) ("For the next two federal elections, until January 1, 2010, in states that require voters to present identification at the polls, voters who fail to do so should nonetheless be allowed to cast a provisional ballot, and their ballot would count if their signature is verified"). During this phase-in period, the report said, States would need to make "efforts to ensure that all voters are provided convenient opportunities to obtain" the required identification. *Id.*, at 141. The former President and former Secretary of State explained this recommendation in an op-ed essay:

> "Yes, we are concerned about the approximately 12 percent of citizens who lack a driver's license. So we proposed that states finally assume the responsibility to seek out citizens to both register voters and pro-

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that a poll tax payment prerequisite would purify elections by preventing repeaters and floaters from voting"); see also Brief for Historians et al. as *Amici Curiae* 4–15 (detailing abuses); R. Hayduk, Gatekeepers to the Franchise: Shaping Election Administration in New York 36 (2005) ("In both historical and contemporary contexts, certain groups have had an interest in alleging fraud and thereby shaping electoral rules and practices in a restrictive direction, and other groups have had an opposite interest").

> vide them with free ID's that meet federal standards. States should open new offices, use social service agencies and deploy mobile offices to register voters. By connecting ID's to registration, voting participation will be expanded." Carter & Baker, Voting Reform Is in the Cards, N. Y. Times, Sept. 23, 2005, p. A19.

Although Indiana claims to have adopted its ID requirement relying partly on the Carter-Baker Report, see Brief for State Respondents 5, 13, 49; see also *ante*, at 194 (lead opinion), the State conspicuously rejected the Carter-Baker Report's phase-in recommendation aimed at reducing the burdens on the right to vote, and just as conspicuously fails even to try to explain why.

What is left of the State's claim must be downgraded further for one final reason: regardless of the interest the State may have in adopting a photo identification requirement as a general matter, that interest in no way necessitates the particular burdens the Voter ID Law imposes on poor people and religious objectors. Individuals unable to get photo identification are forced to travel to the county seat every time they wish to exercise the franchise, and they have to get there within 10 days of the election. See *supra*, at 216–218. Nothing about the State's interest in fighting voter fraud justifies this requirement of a postelection trip to the county seat instead of some verification process at the polling places.

In briefing this Court, the State responds by pointing to an interest in keeping lines at polling places short. See Brief for State Respondents 58. It warns that "[i]f election workers—a scarce resource in any election—must attend to the details of validating provisional ballots, voters may have to wait longer to vote," and it assures us that "[n]othing deters voting so much as long lines at the polls." *Ibid.* But this argument fails on its own terms, for whatever might be the number of individuals casting a provisional ballot, the

State could simply allow voters to sign the indigency affidavit at the polls subject to review there after the election.[33] After all, the Voter ID Law already requires voters lacking photo identification to sign, at the polling site, an affidavit attesting to proper registration. See 458 F. Supp. 2d, at 786.

Indeed, the State's argument more than fails; it backfires, in implicitly conceding that a not-insignificant number of individuals will need to rely on the burdensome provisional-ballot mechanism. What is more, as the District Court found, the Voter ID Law itself actually increases the likelihood of delay at the polls. Since any minor discrepancy between a voter's photo identification card and the registration information may lead to a challenge, "the opportunities for presenting challenges ha[ve] increased as a result of the photo identification requirements." *Id.*, at 789; cf. 472 F. 3d, at 955 (Evans, J., dissenting) ("The potential for mischief with this law is obvious. Does the name on the ID 'conform' to the name on the voter registration list? If the last name of a newly married woman is on the ID but her maiden name is on the registration list, does it conform? If a name is misspelled on one—Schmit versus Schmitt—does it conform? If a 'Terence' appears on one and a shortened 'Terry' on the other, does it conform?").

B

The State's asserted interests in modernizing elections and combating fraud are decidedly modest; at best, they fail to offset the clear inference that thousands of Indiana citizens will be discouraged from voting. The two remaining justifications, meanwhile, actually weaken the State's case.

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[33] Florida has accommodated voters in this manner. In Florida a voter who casts a provisional ballot may have that vote counted if the voter's signature on the provisional-ballot certification matches the signature on the voter's registration. See Fla. Stat. Ann. §§ 101.043, 101.048. The voter is not required to make a second trip to have her provisional ballot counted.

The lead opinion agrees with the State that "the inflation of its voter rolls provides further support for its enactment of" the Voter ID Law. *Ante*, at 196. This is a puzzling conclusion, given the fact, which the lead opinion notes, that the National Government filed a complaint against Indiana, containing this allegation:

> "Indiana has failed to conduct a general program that makes a reasonable effort to identify and remove ineligible voters from the State's registration list; has failed to remove such ineligible voters; and has failed to engage in oversight actions sufficient to ensure that local election jurisdictions identify and remove such ineligible voters." App. 309, 312.

The Federal Government and the State agreed to settle the case, and a consent decree and order have been entered, see *ante*, at 196, requiring Indiana to fulfill its list-maintenance obligations under § 8 of the National Voter Registration Act of 1993, 107 Stat. 82, 42 U. S. C. § 1973gg–6.

How any of this can justify restrictions on the right to vote is difficult to say. The State is simply trying to take advantage of its own wrong: if it is true that the State's fear of in-person voter impersonation fraud arises from its bloated voter checklist, the answer to the problem is in the State's own hands. The claim that the State has an interest in addressing a symptom of the problem (alleged impersonation) rather than the problem itself (the negligently maintained bloated rolls) is thus self-defeating; it shows that the State has no justifiable need to burden the right to vote as it does, and it suggests that the State is not as serious about combating fraud as it claims to be.[34]

[34] The voting-rolls argument also suggests that it would not be so difficult to detect in-person voter fraud after all. If it is true that practitioners of fraud are most likely to vote in the name of registered voters whom they know to have died or left the jurisdiction, then Indiana could simply audit its voting records to examine whether, and how often, in-person votes were cast using these invalid registrations.

The State's final justification, its interest in safeguarding voter confidence, similarly collapses. The problem with claiming this interest lies in its connection to the bloated voter rolls; the State has come up with nothing to suggest that its citizens doubt the integrity of the State's electoral process, except its own failure to maintain its rolls. The answer to this problem is not to burden the right to vote, but to end the official negligence.

It should go without saying that none of this is to deny States' legitimate interest in safeguarding public confidence. The Court has, for example, recognized that fighting perceptions of political corruption stemming from large political contributions is a legitimate and substantial state interest, underlying not only campaign finance laws, but bribery and antigratuity statutes as well. See *Nixon*, 528 U. S., at 390. But the force of the interest depends on the facts (or plausibility of the assumptions) said to justify invoking it. See *id.*, at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). While we found in *Nixon* that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," *id.*, at 395, there is plenty of reason to be doubtful here, both about the reality and the perception. It is simply not plausible to assume here, with no evidence of in-person voter impersonation fraud in a State, and very little of it nationwide, that a public perception of such fraud is nevertheless "inherent" in an election system providing severe criminal penalties for fraud and mandating signature checks at the polls. Cf. *id.*, at 390 ("[T]he perception of corruption [is] 'inherent in a regime of large individual financial contributions' to candidates for public office" (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 27 (1976) *(per curiam)*)).

C

Without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country. The State recognizes that tens of thousands of qualified voters lack the necessary federally issued or state-issued identification, but it insists on implementing the requirement immediately, without allowing a transition period for targeted efforts to distribute the required identification to individuals who need it. The State hardly even tries to explain its decision to force indigents or religious objectors to travel all the way to their county seats every time they wish to vote, and if there is any waning of confidence in the administration of elections it probably owes more to the State's violation of federal election law than to any imposters at the polling places. It is impossible to say, on this record, that the State's interest in adopting its signally inhibiting photo identification requirement has been shown to outweigh the serious burdens it imposes on the right to vote.

If more were needed to condemn this law, our own precedent would provide it, for the calculation revealed in the Indiana statute crosses a line when it targets the poor and the weak. Cf. *Anderson*, 460 U. S., at 793 ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status"). If the Court's decision in *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966), stands for anything, it is that being poor has nothing to do with being qualified to vote. *Harper* made clear that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.*, at 668. The State's requirements here, that people without cars travel to a motor vehicle registry and that the poor who fail to do that get to their county seats within 10 days of

every election, likewise translate into unjustified economic burdens uncomfortably close to the outright $1.50 fee we struck down 42 years ago. Like that fee, the onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise.

* * *

The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old. I would vacate the judgment of the Seventh Circuit, and remand for further proceedings.

JUSTICE BREYER, dissenting.

Indiana's statute requires registered voters to present photo identification at the polls. It imposes a burden upon some voters, but it does so in order to prevent fraud, to build confidence in the voting system, and thereby to maintain the integrity of the voting process. In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 402 (2000) (BREYER, J., concurring); *ante*, at 190–191 (lead opinion) (similar standard); *ante*, at 210–211 (SOUTER, J., dissenting) (same). Applying this standard, I believe the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID.

Like JUSTICE STEVENS, I give weight to the fact that a national commission, chaired by former President Jimmy

Carter and former Secretary of State James Baker, studied the issue and recommended that States should require voter photo IDs. See Report of the Commission on Federal Election Reform, Building Confidence in U. S. Elections §2.5 (Sept. 2005) (Carter-Baker Report), App. 136–144. Because the record does not discredit the Carter-Baker Report or suggest that Indiana is exceptional, I see nothing to prevent Indiana's Legislature (or a federal court considering the constitutionality of the statute) from taking account of the legislatively relevant facts the report sets forth and paying attention to its expert conclusions. Thus, I share the general view of the lead opinion insofar as it holds that the Constitution does not *automatically* prohibit Indiana from enacting a photo ID requirement. Were I also to believe, as JUSTICE STEVENS believes, that the burden imposed by the Indiana statute on eligible voters who lack photo IDs is indeterminate "on the basis of the record that has been made in this litigation," *ante*, at 202, or were I to believe, as JUSTICE SCALIA believes, that the burden the statute imposes is "minimal" or "justified," *ante*, at 204 (opinion concurring in judgment), then I too would reject the petitioners' facial attack, primarily for the reasons set forth in Part II of the lead opinion, see *ante*, at 191–197.

I cannot agree, however, with JUSTICE STEVENS' or JUSTICE SCALIA's assessment of the burdens imposed by the statute. The Carter-Baker Commission *conditioned* its recommendation upon the States' willingness to ensure that the requisite photo IDs "be easily available and issued free of charge" and that the requirement be "phased in" over two federal election cycles, to ease the transition. Carter-Baker Report, App. 139, 140. And as described in Part II of JUSTICE SOUTER's dissenting opinion, see *ante*, at 211–223, Indiana's law fails to satisfy these aspects of the Commission's recommendation.

For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to

travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system. See *ante*, at 213–215 (SOUTER, J., dissenting) (noting that out of Indiana's 92 counties, 21 have no public transportation system at all and 32 others restrict public transportation to regional county service). For another, many of these individuals may be uncertain about how to obtain the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome (up to $12 for a copy of a birth certificate; up to $100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of $1.50 (less than $10 today, inflation adjusted). See *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 664, n. 1, 666 (1966); *ante*, at 236–237 (SOUTER, J., dissenting). Further, Indiana's exception for voters who cannot afford this cost imposes its own burden: a postelection trip to the county clerk or county election board to sign an indigency affidavit *after each election*. See *ante*, at 216–218 (same).

By way of contrast, two other States—Florida and Georgia—have put into practice photo ID requirements significantly less restrictive than Indiana's. Under the Florida law, the range of permissible forms of photo ID is substantially greater than in Indiana. See Fla. Stat. Ann. § 101.043(1) (West Supp. 2008) (including a debit or credit card, a student ID, a retirement center ID, a neighborhood association ID, and a public assistance ID). Moreover, a Florida voter who lacks photo ID may cast a provisional ballot at the polling place that will be counted if the State determines that his signature matches the one on his voter registration form. §§ 101.043(2); 101.048(2)(b).

Georgia restricts voters to a more limited list of acceptable photo IDs than does Florida, but accepts in addition to proof of voter registration a broader range of underlying documen-

tation than does Indiana. See Ga. Code Ann. §21–2–417 (Supp. 2007); Ga. Comp. Rules & Regs., Rule 183–1–20.01 (2006) (permissible underlying documents include a paycheck stub, Social Security, Medicare, or Medicaid statement, school transcript, or federal affidavit of birth, as long as the document includes the voter's full name and date of birth). Moreover, a Federal District Court found that Georgia "has undertaken a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free [state-issued] Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the voters that they can vote absentee by mail without a Photo ID." *Common Cause/Georgia* v. *Billups*, 504 F. Supp. 2d 1333, 1380 (ND Ga. 2007). While Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, in Georgia *any* voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so. Compare Ind. Code Ann. §3–11–4–1 (West 2006) with Ga. Code Ann. §21–2–381 (Supp. 2007). Finally, neither Georgia nor Florida insists, as Indiana does, that indigent voters travel each election cycle to potentially distant places for the purposes of signing an indigency affidavit.

The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States, or than the Carter-Baker Commission recommended nationwide. Nor is there any reason to think that there are proportionately fewer such voters in Indiana than elsewhere in the country (the District Court's rough estimate was 43,000). See 458 F. Supp. 2d 775, 807 (SD Ind. 2006). And I need not determine the constitutionality of Florida's or Georgia's requirements (matters not before us), in order to conclude that Indiana's requirement imposes a significantly harsher, unjustified burden.

Of course, the Carter-Baker Report is not the Constitution of the United States. But its findings are highly relevant to both legislative and judicial determinations of the reasonableness of a photo ID requirement; to the related necessity of ensuring that all those eligible to vote possess the requisite IDs; and to the presence of alternative methods of ensuring that possession, methods that are superior to those that Indiana's statute sets forth. The Commission's findings, taken together with the considerations set forth in Part II of JUSTICE STEVENS' opinion, and Part II of JUSTICE SOUTER's dissenting opinion, lead me to the conclusion that while the Constitution does not in general prohibit Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs. For these reasons, I dissent.

Syllabus

GONZALEZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06–11612. Argued January 8, 2008—Decided May 12, 2008

If the parties consent, a federal magistrate judge may preside over the *voir dire* and jury selection in a felony criminal trial. *Peretz* v. *United States*, 501 U. S. 923, 933. Before petitioner's federal trial on felony drug charges, his counsel consented to the Magistrate Judge's presiding over jury selection. Petitioner was not asked for his own consent. After the Magistrate Judge supervised *voir dire* without objection, a District Judge presided at trial, and the jury returned a guilty verdict on all counts. Petitioner contended for the first time on appeal that it was error not to obtain his own consent to the Magistrate Judge's *voir dire* role. The Fifth Circuit affirmed the convictions, concluding, *inter alia*, that the right to have a district judge preside over *voir dire* could be waived by counsel.

Held: Express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the Federal Magistrates Act, 28 U. S. C. §636(b)(3), which states: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." Under *Gomez* v. *United States*, 490 U. S. 858, 870, 875–876, and *Peretz*, *supra*, at 933, 935–936, such "additional duties" include presiding at *voir dire* if the parties consent, but not if there is an objection. Generally, where there is a full trial, there are various points at which rights either can be asserted or waived. This Court has indicated that some of these rights require the defendant's own consent to waive. See, *e. g.*, *New York* v. *Hill*, 528 U. S. 110, 114–115. The Court held in *Hill*, however, that an attorney, acting without indication of particular consent from his client, could waive his client's statutory right to a speedy trial because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." *Ibid.* Similar to the scheduling matter in *Hill*, acceptance of a magistrate judge at the jury selection phase is a tactical decision well suited for the attorney's own decision. The presiding judge has significant discretion over jury selection both as to substance—the questions asked—and tone—formal or informal—and the judge's approach may be relevant in light of the approach of the attorney, who may decide whether to accept a magistrate judge based in part on these factors. As with other tactical decisions, requiring

personal, on-the-record approval from the client could necessitate a lengthy explanation that the client might not understand and that might distract from more pressing matters as the attorney seeks to prepare the best defense. Petitioner argues unconvincingly that the decision to have a magistrate judge for *voir dire* is a fundamental choice, cf. *id.*, at 114, or, at least, raises a question of constitutional significance so that the Act should be interpreted to require explicit consent. Serious concerns about the Act's constitutionality are not present here, and petitioner concedes that magistrate judges are capable of competent and impartial performance when presiding over jury selection. *Gomez*, *supra*, at 876, distinguished. Pp. 245–253.

483 F. 3d 390, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 254. THOMAS, J., filed a dissenting opinion, *post*, p. 258.

Brent E. Newton argued the cause for petitioner. With him on the briefs were *Marjorie A. Meyers*, *H. Michael Sokolow*, and *Timothy Crooks*.

Lisa S. Blatt argued the cause for the United States. With her on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.*

JUSTICE KENNEDY delivered the opinion of the Court.

If the parties consent, federal magistrate judges may preside over the *voir dire* and selection of prospective jurors in a felony criminal trial. *Peretz* v. *United States*, 501 U. S. 923, 933 (1991). This case presents the question whether it suffices for counsel alone to consent to the magistrate judge's role in presiding over *voir dire* and jury selection or whether the defendant must give his or her own consent.

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*Briefs of *amici curiae* urging reversal were filed for the Charles Hamilton Houston Institute for Race and Justice by *Charles J. Ogletree, Jr.*, and *Rachel E. Barkow*; and for the National Association of Criminal Defense Lawyers et al. by *Joel B. Rudin*, *Joshua L. Dratel*, and *Henry J. Bemporad*.

Homero Gonzalez was charged in the United States District Court for the Southern District of Texas on five felony drug offense counts. He is the petitioner here. At the outset of jury selection, the parties appeared before a Magistrate Judge. The Magistrate Judge asked the attorneys to approach the bench. After they complied, the Magistrate Judge said: "I need to ask the parties at this time if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case." App. 16. Petitioner's counsel responded: "Yes, your Honor, we are." *Ibid.* The Magistrate Judge asked if petitioner was present and if he needed an interpreter. Petitioner's counsel answered yes to both questions. Petitioner was not asked if he consented to the Magistrate Judge's presiding. The record does not permit us to infer this or even to infer that petitioner knew there was a right to be waived. The Magistrate Judge then supervised *voir dire* and jury selection. Petitioner made no objections to the Magistrate Judge's rulings or her conduct of the proceedings. A District Judge presided at the ensuing jury trial, and the jury returned a verdict of guilty on all counts.

Petitioner appealed, contending, for the first time, that it was error not to obtain his own consent to the Magistrate Judge's presiding at *voir dire*. The United States Court of Appeals for the Fifth Circuit affirmed the convictions. The court concluded petitioner could not show the error was plain and, furthermore, there was no error at all. It held the right to have an Article III judge preside over *voir dire* could be waived by petitioner's counsel. 483 F. 3d 390, 394 (2007). The Courts of Appeals differ on this issue. Compare *ibid.* with *United States* v. *Maragh*, 174 F. 3d 1202, 1206 (CA11 1999) (requiring personal and explicit consent from the defendant); see also *United States* v. *Desir*, 273 F. 3d 39, 44 (CA1 2001) (magistrate judge may conduct jury selection unless the defendant or his attorney registers an objection).

We granted certiorari. 551 U. S. 1192 (2007). We agree that there was no error and hold that petitioner's counsel had full authority to consent to the Magistrate Judge's role.

The Federal Magistrates Act, 28 U. S. C. § 631 *et seq.* (2000 ed. and Supp. V), permits district courts to assign designated functions to magistrate judges. For example, magistrate judges are authorized to: issue orders concerning release or detention of persons pending trial; take acknowledgments, affidavits, and depositions; and enter sentences for petty offenses. § 636(a) (2000 ed. and Supp. V). They also may hear and determine, when designated to do so, any pretrial matter pending before the district court, with the exception of certain specified motions. Magistrate judges may also conduct hearings and propose recommendations for those motions, applications for post-trial criminal relief, and conditions of confinement petitions. § 636(b)(1) (2000 ed.). If the parties consent, they may conduct misdemeanor criminal trials and civil trials. §§ 636(a)(3) and (c)(1).

The statutory provision of direct applicability in the present case is § 636(b)(3). It states: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The general, nonspecific terms of this paragraph, preceded by text that sets out permissible duties in more precise terms, constitute a residual or general category that must not be interpreted in terms so expansive that the paragraph overshadows all that goes before.

In two earlier cases the Court considered the question of magistrate judges presiding over the jury selection process in felony trials. In *Gomez* v. *United States*, 490 U. S. 858 (1989), the District Judge delegated the task of selecting a jury to a Federal Magistrate Judge. Defense counsel objected, but the objection was overruled. The Court noted that "[a] critical limitation on [the magistrate judge's] expanded jurisdiction is consent," *id.*, at 870, and held that presiding, over an objection, at the preliminary selection phase

of a jury trial in felony cases is not among the additional duties that a magistrate judge may assume, *id.*, at 875–876.

In *Peretz* v. *United States*, 501 U. S. 923, the Court again considered whether a magistrate judge could preside over *voir dire* in a felony case. In that instance, however, defendant's counsel, upon being asked by the District Court at a pretrial conference (with the defendant present) if there was any objection to having jury selection before a magistrate judge, responded, "'I would love the opportunity.'" *Id.*, at 925. Defense counsel later advised the Magistrate Judge that the defendant consented to the process. The Court clarified that in a felony trial neither the Act nor Article III forbids supervision of *voir dire* by a magistrate judge if both parties consent. *Id.*, at 935–936.

Taken together, *Gomez* and *Peretz* mean that "the additional duties" the statute permits the magistrate judge to undertake include presiding at *voir dire* and jury selection provided there is consent but not if there is an objection. We now consider whether the consent can be given by counsel acting on behalf of the client but without the client's own express consent.

At first reading it might seem that our holding here is dictated by the holding in *Peretz*. In *Peretz*, it would appear the accused was aware of the colloquy between the District Judge and defense counsel and the formal waiver before the Magistrate Judge. On this premise *Peretz* might be read narrowly to hold that a defendant may signal consent by failing to object; and indeed, petitioner here seeks to distinguish *Peretz* on this ground. Brief for Petitioner 41–42. We decide this case, however, on the assumption that the defendant did not hear, or did not understand, the waiver discussions. This addresses what, at least in petitioner's view, *Peretz* did not. It should be noted that we do not have before us an instance where a defendant instructs the lawyer or advises the court in an explicit, timely way that he or she demands that a district judge preside in this preliminary phase.

There are instances in federal criminal proceedings where the procedural requisites for consent are specified and a right cannot be waived except with a defendant's own informed consent. Under Federal Rule of Criminal Procedure 11(b), for example, the district court is required, as a precondition to acceptance of a guilty plea, to inform the defendant in person of the specified rights he or she may claim in a full criminal trial and then verify that the plea is voluntary by addressing the defendant. The requirement is satisfied by a colloquy between judge and defendant, reviewing all of the rights listed in Rule 11.

Statutes may also address this subject. Under 18 U. S. C. §3401(b), for example, a magistrate judge may preside over the whole trial and sentencing in a misdemeanor case but only with the express, personal consent of the defendant. The provision requires that the magistrate judge

> "carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a district judge and that he may have a right to trial by jury before a district judge or magistrate judge. The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record."

The controlling statute in this case has a different design, however. Title 28 U. S. C. §636(b)(3) does not state that consent to preside over felony *voir dire* must be granted by following a procedure of similar clarity. As a general matter, where there is a full trial there are various points in the pretrial and trial process when rights either can be asserted or waived; and there is support in our cases for concluding that some of these rights cannot be waived absent the defendant's own consent. Whether the personal consent must

be explicit and on the record or can be determined from a course of conduct may be another matter, but for now it suffices to note that we have acknowledged that some rights cannot be waived by the attorney alone. See *New York* v. *Hill*, 528 U. S. 110, 114–115 (2000).

Citing some of our precedents on point, the Court in *Hill* gave this capsule discussion:

> "What suffices for waiver depends on the nature of the right at issue. '[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.' *United States* v. *Olano*, 507 U. S. 725, 733 (1993). For certain fundamental rights, the defendant must personally make an informed waiver. See, *e. g.*, *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465 (1938) (right to counsel); *Brookhart* v. *Janis*, 384 U. S. 1, 7–8 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel. 'Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial.' *Taylor* v. *Illinois*, 484 U. S. 400, 417–418 (1988). As to many decisions pertaining to the conduct of the trial, the defendant is 'deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."' *Link* v. *Wabash R. Co.*, 370 U. S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U. S. 320, 326 (1880)). Thus, decisions by counsel are generally given effect as to what arguments to pursue, see *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983), what evidentiary objections to raise, see *Henry* v. *Mississippi*, 379 U. S. 443, 451 (1965), and what agreements to conclude regarding the admission of evidence, see *United States* v. *McGill*,

11 F. 3d 223, 226–227 (CA1 1993). Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Ibid.*

The issue in *Hill* was whether the attorney, acting without indication of particular consent from his client, could waive his client's statutory right to a speedy trial pursuant to the Interstate Agreement on Detainers. The Court held that the attorney's statement, without any showing of the client's explicit consent, could waive the speedy trial right: "Scheduling matters are plainly among those for which agreement by counsel generally controls." *Id.*, at 115.

Giving the attorney control of trial management matters is a practical necessity. "The adversary process could not function effectively if every tactical decision required client approval." *Taylor* v. *Illinois*, 484 U. S. 400, 418 (1988). The presentation of a criminal defense can be a mystifying process even for well-informed laypersons. This is one of the reasons for the right to counsel. See *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932); ABA Standards for Criminal Justice, Defense Function 4–5.2, Commentary, p. 202 (3d ed. 1993) ("Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile"). Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote. In exercising professional judgment, moreover, the attorney draws upon the expertise and experience that members of the bar should bring to the trial process. In most instances the attorney will

have a better understanding of the procedural choices than the client; or at least the law should so assume. See *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983); see also *Tollett* v. *Henderson*, 411 U. S. 258, 267–268 (1973); cf. ABA Standards, *supra*, at 202 ("Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client 'plucks at the attorney's sleeve' offering gratuitous suggestions"). To hold that every instance of waiver requires the personal consent of the client himself or herself would be impractical.

Similar to the scheduling matter in *Hill*, acceptance of a magistrate judge at the jury selection phase is a tactical decision that is well suited for the attorney's own decision. Under Rule 24 of the Federal Rules of Criminal Procedure, the presiding judge has significant discretion over the structure of *voir dire*. The judge may ask questions of the jury pool or, as in this case, allow the attorneys for the parties to do so. Fed. Rule Crim. Proc. 24(a); App. 20. A magistrate judge's or a district judge's particular approach to *voir dire* both in substance—the questions asked—and in tone—formal or informal—may be relevant in light of the attorney's own approach. The attorney may decide whether to accept the magistrate judge based in part on these factors. As with other tactical decisions, requiring personal, on-the-record approval from the client could necessitate a lengthy explanation the client might not understand at the moment and that might distract from more pressing matters as the attorney seeks to prepare the best defense. For these reasons we conclude that express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the authorization in §636(b)(3).

Our holding is not inconsistent with reading other precedents to hold that some basic trial choices are so important that an attorney must seek the client's consent in order to waive the right. See, *e. g.*, *Florida* v. *Nixon*, 543 U. S. 175,

187 (2004) (identifying the choices "'to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal'" as examples (quoting *Jones*, *supra*, at 751)). Petitioner argues that the decision to have a magistrate judge rather than an Article III judge preside at jury selection is a fundamental choice, cf. *Hill*, 528 U. S., at 114, or, at least, raises a question of constitutional significance so that we should interpret the Act to require an explicit personal statement of consent before the magistrate judge can proceed with jury selection.

We conclude otherwise. Under the avoidance canon, "when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Harris* v. *United States*, 536 U. S. 545, 555 (2002) (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)). The canon, however, does not apply unless there are "serious concerns about the statute's constitutionality." *Harris*, *supra*, at 555; see also *Reno* v. *Flores*, 507 U. S. 292, 314, n. 9 (1993).

Those concerns are not present here. Petitioner concedes that a magistrate judge is capable of competent and impartial performance of the judicial tasks involved in jury examination and selection. Reply Brief for Petitioner 12–13; see also *Peretz*, 501 U. S., at 935 ("The Act evinces a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection"). The Act contains some features to ensure impartiality. See, *e. g.*, 28 U. S. C. §§631(i) (establishing requirements for removal), 632 (limiting concurrent employment), 634(b) (providing salary protection during the term). And "'the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors.'" *Peretz*, *supra*, at 938 (quoting *United States* v. *Raddatz*, 447 U. S. 667, 686 (1980) (Blackmun, J., concurring)). Here petitioner made no objections to the rulings by the Magistrate Judge. Had ob-

jections been made, nothing in the record or the rules indicates that the District Judge could not have ruled on the issues, all with no delay or prejudice to any trial that had commenced. See *Peretz*, *supra*, at 935, n. 12, 939. These factors support our determination that consent of counsel suffices to allow a magistrate judge to supervise *voir dire*. This is not a case where the magistrate judge is asked to preside or make determinations after the trial has commenced and it is arguably difficult or disruptive for a district judge to review any objections that might have been made to the magistrate judge's rulings.

Petitioner notes that *Peretz* considered supervision over entire civil and misdemeanor trials comparable to presiding over *voir dire* at a felony trial. 501 U. S., at 933. It follows, he argues, that §636(b)(3) must require, as does 18 U. S. C. §3401(b), express personal consent by the defendant before a magistrate judge may preside over *voir dire*. But it is not obvious that Congress would have thought these matters required the same form of consent. Aside from the fact that the statutory text is different, there are relevant differences between presiding over a full trial and presiding over *voir dire*. Were petitioner correct, one would think the Act would require at least the same form of consent to authorize a magistrate judge to preside over either a civil or a misdemeanor trial (which *Peretz* also deemed to be of comparable importance). Our interpretation of the Act indicates otherwise. Compare §3401(b) with *Roell* v. *Withrow*, 538 U. S. 580, 590 (2003) (concluding that parties may authorize a full-time magistrate judge to preside over a civil trial via implied consent).

Petitioner argues that our view of the issue should be informed by *Gomez*'s conclusion that having a magistrate judge during jury selection without consent is structural error, not subject to harmless-error review. See 490 U. S., at 876. The exemption of certain errors from harmless-

error review "recognizes that some errors necessarily render a trial fundamentally unfair." *Rose* v. *Clark*, 478 U. S. 570, 577 (1986); see also *id.*, at 577–578. In petitioner's view, *Gomez* establishes that the issue in this case is of sufficient gravity or concern that personal consent must be required.

The Court held in *Gomez* that imposition of a magistrate judge over objection was structural error, violating the basic right to a trial conducted at all critical stages by a judicial officer with appropriate jurisdiction. 490 U. S., at 876. It does not follow, however, that this structural aspect requires an insistence on personal consent. Here, jurisdiction turns on consent; and for the reasons discussed above an attorney, acting on the client's behalf, can make an informed decision to allow the magistrate judge to exercise the jurisdiction Congress permits.

Although a criminal defendant may demand that an Article III judge preside over the selection of a jury, the choice to do so reflects considerations more significant to the realm of the attorney than to the accused. Requiring the defendant to consent to a magistrate judge only by way of an on-the-record personal statement is not dictated by precedent and would burden the trial process, with little added protection for the defendant.

Pursuant to 28 U. S. C. §636(b)(3) a magistrate judge may preside over jury examination and jury selection only if the parties, or the attorneys for the parties, consent. Consent from an attorney will suffice. We do not have before us, and we do not address, an instance where the attorney states consent but the party by express and timely objection seeks to override his or her counsel. We need not decide, moreover, if consent may be inferred from a failure by a party and his or her attorney to object to the presiding by a magistrate judge. These issues are not presented here.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court that no statute or rule requires that petitioner personally participate in the waiver of his right to have an Article III judge oversee *voir dire*. As to whether the Constitution requires that, the Court holds that it does not because it is a decision more tactical than fundamental—"more significant to the realm of the attorney than to the accused." *Ante*, at 253. I agree with the Court's conclusion, but not with the tactical-vs.-fundamental test on which it is based.

Petitioner and the Government do not dispute that petitioner's counsel consented to have a magistrate judge oversee *voir dire*. The issue is whether that consent—consent of counsel alone—effected a valid waiver of petitioner's right to an Article III judge. It is important to bear in mind that we are not speaking here of action taken by counsel over his client's objection—which would have the effect of revoking the agency with respect to the action in question. See *Brookhart* v. *Janis*, 384 U. S. 1, 7–8 (1966). There is no suggestion of that. The issue is whether consent expressed by counsel alone is ineffective simply because the defendant himself did not express to the court his consent.

I think not. Our opinions have sometimes said in passing that, under the Constitution, certain "fundamental" or "basic" rights cannot be waived unless a defendant personally participates in the waiver. See, *e. g.*, *Taylor* v. *Illinois*, 484 U. S. 400, 417–418 (1988); *United States* v. *Olano*, 507 U. S. 725, 733 (1993). We have even repeated the suggestion in cases that actually involved the question whether a criminal defendant's attorney could waive a certain right—but never in a case where the suggestion governed the disposition. In *New York* v. *Hill*, 528 U. S. 110 (2000), although we noted that "[f]or certain fundamental rights, the defendant must personally make an informed waiver," *id.*, at 114, we in fact found such a requirement inapplicable; and even that determination can be viewed as resting upon an interpre-

tation of the statute creating the right that counsel had waived, see *id.*, at 115. And in *Florida* v. *Nixon*, 543 U. S. 175 (2004), although we said that "counsel lacks authority to consent to a guilty plea on [his] client's behalf," *id.*, at 187, our holding was simply that counsel's concession of guilt to the jury did not amount to a guilty plea, *id.*, at 188, and did not constitute ineffective assistance of counsel, *id.*, at 192. As detailed in the margin, the decisions often cited for the principle of attorney incapacity are inapposite;[1] except for one line of precedent, no decision of this Court holds that, as a constitutional matter, a defendant must personally waive certain of his "fundamental" rights—which typically are identified as the rights to trial, jury, and counsel. The exceptional line of precedent involves the right to counsel. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465 (1938). But that right is essentially *sui generis*, since an unrepresented

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[1] On the right to jury, *Thompson* v. *Utah*, 170 U. S. 343 (1898), held, at most, that the right was not waivable. *Id.*, at 353–354. The Court later questioned whether *Thompson* even held that, and went on to hold that the right is waivable. See *Patton* v. *United States*, 281 U. S. 276, 293 (1930). The observation at the end of *Patton* that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant," *id.*, at 312, was dictum; the *Patton* defendants had all agreed to the waiver, *id.*, at 286–287. Even less germane is *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 (1942), which held only that an unrepresented defendant can waive his right to jury without the advice of counsel. *Id.*, at 278–279.

On the right to trial, *Brookhart* v. *Janis*, 384 U. S. 1 (1966), held only that a defendant's expressed wish to proceed to trial must prevail over his attorney's contrary opinion. See *id.*, at 7–8. Other decisions have said that waiver of the right to trial must be knowing and voluntary, see, *e. g.*, *Brady* v. *United States*, 397 U. S. 742, 748 (1970), but waiver by counsel was not at issue in those cases. Even if, in the case of waiver by counsel, the knowing and voluntary requirement applies to the defendant himself, that still permits counsel to waive on behalf of an informed and agreeing client. Equally inapposite is *Boykin* v. *Alabama*, 395 U. S. 238 (1969), which held that a knowing and voluntary waiver of the right to trial cannot be inferred from a silent record. *Id.*, at 244.

defendant cannot possibly waive his right to counsel except in person. Cases involving that right therefore provide no support for the principle that the Constitution sometimes forbids attorney waiver.

Since a formula repeated in dictum but never the basis for judgment is not owed *stare decisis* weight, see *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 545–546 (2005), our precedents have not established the rule of decision applicable in this case. I would not adopt the tactical-vs.-fundamental approach, which is vague and derives from nothing more substantial than this Court's say-so. One respected authority has noted that the approach has a "potential for uncertainty," and that our precedents purporting to apply it "have been brief and conclusionary." 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §§ 11.6(a), (c), pp. 784, 796 (3d ed. 2007). That is surely an understatement. What makes a right tactical? Depending on the circumstances, waiving *any* right can be a tactical decision. Even pleading guilty, which waives the right to trial, is highly tactical, since it usually requires balancing the prosecutor's plea bargain against the prospect of better and worse outcomes at trial.

Whether a right is "fundamental" is equally mysterious. One would think that any right guaranteed by the Constitution would be fundamental. But I doubt many think that the Sixth Amendment right to confront witnesses cannot be waived by counsel. See *Diaz* v. *United States*, 223 U. S. 442, 444, 452–453 (1912). Perhaps, then, specification in the Constitution is a necessary, but not sufficient, condition for "fundamental" status. But if something more is necessary, I cannot imagine what it might be. Apart from constitutional guarantee, I know of no objective criterion for ranking rights. The Court concludes that the right to have an Article III judge oversee *voir dire* is not a fundamental right, *ante*, at 250–252, without answering whether it is even a con-

stitutional right,[2] and without explaining what makes a right fundamental in the first place. The essence of "fundamental" rights continues to elude.

I would therefore adopt the rule that, as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel. There is no basis in the Constitution, or as far as I am aware in common-law practice, for distinguishing in this regard between a criminal defendant and his authorized representative. In fact, the very notion of representative litigation suggests that the Constitution draws no distinction between them. "A prisoner . . . who defends by counsel, and silently acquiesces in what they agree to, is bound as any other principal by the act of his agent." *People* v. *Rathbun*, 21 Wend. 509, 543 (N. Y. Sup. Ct. 1839). The *Rathbun* opinion, far from being the outlier view of a state court, was adopted as the common-law position by eminent jurists of the 19th century, including Chief Justice Shaw of the Supreme Judicial Court of Massachusetts. See *Commonwealth* v. *Dailey*, 66 Mass. 80, 83 (1853) (discussing *Rathbun* with approval in a case involving waiver of the right to a 12-man jury).

It may well be desirable to require a defendant's personal waiver with regard to certain rights. Rule 11(c) of the Federal Rules of Criminal Procedure, for example, provides that before accepting a guilty plea the court must "address the defendant personally in open court," advise him of the conse-

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[2] We have avoided addressing whether the right has a basis in the Constitution. In *Gomez* v. *United States*, 490 U. S. 858 (1989), we interpreted the Federal Magistrates Act, 28 U. S. C. §636(b)(3), not to permit a magistrate judge to oversee *voir dire*, 490 U. S., at 875–876, making it unnecessary to consider whether there was a constitutional right to have an Article III judge oversee *voir dire*. In *Peretz* v. *United States*, 501 U. S. 923 (1991), we held that judicial overseeing of the *voir dire* had been waived, *id.*, at 936–937, which obviated having to decide whether it was a constitutional right. See *United States* v. *Olano*, 507 U. S. 725, 732–733 (1993) (waiver extinguishes the error of not complying with a legal rule).

quences of his plea, and ensure that the plea is voluntary. See also Rule 10(b) (waiver of right to appear at arraignment must be in writing signed by counsel and defendant). I do not contend that the Sixth Amendment's right to assistance of counsel prohibits such requirements of personal participation, at least where they do not impair counsel's expert assistance.

Even without such rules it is certainly prudent, to forestall later challenges to counsel's conduct, for a trial court to satisfy itself of the defendant's personal consent to certain actions, such as entry of a guilty plea or waiver of jury trial, for which objective norms require an attorney to seek his client's authorization. See, *e. g.*, ABA Model Rule of Professional Conduct 1.2(a) (2007) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify"). But I know of no basis for saying that the *Constitution* automatically invalidates *any* trial action not taken by the defendant personally, though taken by his authorized counsel. I know of no way of determining, except by sheer prescription, which trial rights are *ex ante* and *by law* subject to such a limitation upon waiver. Assuredly the tactical-fundamental dichotomy does not do the trick. I would leave this matter of placing reasonable limits upon the right of agency in criminal trials to be governed by positive law, in statutes and rules of procedure.

I would hold that petitioner's counsel's waiver was effective because no rule or statute provides that the waiver come from the defendant personally.

JUSTICE THOMAS, dissenting.

The Court holds today that neither the Federal Magistrates Act, 28 U. S. C. §631 *et seq.*, nor the Constitution requires that a criminal defendant on trial for a felony personally give his informed consent before a magistrate judge may

preside over jury selection. The Court proceeds from the premise, established in *Peretz* v. *United States*, 501 U. S. 923 (1991), that the Federal Magistrates Act authorizes magistrate judges to preside over felony jury selection if the parties consent. I reject that premise and, for the reasons set forth below, would overrule *Peretz* and hold that the delegation of *voir dire* in this case was statutory error. I further conclude that the error may be corrected despite petitioner's failure to raise a timely objection in the District Court. Accordingly, I would reverse the judgment below.

I

A

This is the third time the Court has addressed the circumstances under which a district judge may delegate felony *voir dire* proceedings to a magistrate judge under the "additional duties" clause of the Federal Magistrates Act, 28 U. S. C. §636(b)(3). In *Gomez* v. *United States*, 490 U. S. 858 (1989), the Court unanimously held that §636(b)(3) does not authorize delegation of felony *voir dire* proceedings to a magistrate judge. Although the defendants in *Gomez* had objected to the delegation, neither the Court's reasoning nor its conclusion turned on that fact. Rather, the Court's interpretation of §636(b)(3) rested primarily on two inferences drawn from the statutory scheme. First, the Court reasoned that Congress' "carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Id.*, at 872. Second, the Court found it "incongruous" to assume that Congress intended felony jury selection to be among magistrate judges' additional duties but failed to provide an explicit standard of review as it had done for other duties described in the statute. *Id.*, at 874. Neither of these inferences depended on the presence or absence of the parties' consent, and the Court's conclusion was accordingly unqualified:

"Congress . . . did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties." *Id.*, at 872; see also *ibid.*, n. 25 ("[W]e decide that the Federal Magistrates Act does not allow the delegation of jury selection to magistrates"); *id.*, at 875–876 ("The absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function" (footnote omitted)).

Two years later, the Court decided *Peretz*. Peretz's trial took place before this Court's decision in *Gomez*, and his attorney had agreed to the delegation of *voir dire*, assuring the Magistrate Judge that his client had consented. During the pendency of Peretz's appeal the Court decided *Gomez*, and Peretz argued that *Gomez* required reversal of his conviction. The Court of Appeals disagreed, concluding that he had waived any challenge to the Magistrate Judge's supervision of *voir dire*. Before this Court, the Government defended the Court of Appeals' holding as to waiver but confessed error with respect to the delegation of *voir dire*, "agree[ing] with petitioner . . . that *Gomez* foreclose[d] the argument that the statute may be read to authorize magistrate-conducted voir dire when the defendant consents." Brief for United States in *Peretz* v. *United States*, O. T. 1990, No. 90–615, p. 9.

Despite the Government's confession of error, the Court, "[i]n an amazing display of interpretive gymnastics," *Peretz*, *supra*, at 940–941 (Marshall, J., dissenting), held in a 5-to-4 decision that §636(b)(3) does, after all, permit magistrate judges to conduct felony *voir dire* proceedings, so long as the parties consent. There is no need here to reproduce *Peretz*'s flawed reasoning or to rehash the debate between the majority and dissenting opinions. Suffice it to say that, in my view, *Gomez* correctly interpreted §636(b)(3) not to authorize delegation of felony jury selection regardless of the parties' consent, and I agree with the dissenters in *Peretz* that

the Court's contrary conclusion in that case was based on a patently "revisionist construction of the Act." 501 U. S., at 947 (opinion of Marshall, J.).

The only question, then, is whether to give *stare decisis* effect to *Peretz*'s erroneous conclusion that § 636(b)(3) authorizes magistrate judges to conduct felony jury selection if the parties consent. Although "[i]t is true that we give stronger *stare decisis* effect to our holdings in statutory cases than in constitutional cases," that rule "is not absolute, and we should not hesitate to allow our precedent to yield to the true meaning of an Act of Congress when our statutory precedent is 'unworkable' or 'badly reasoned.'" *Clark* v. *Martinez*, 543 U. S. 371, 401–402 (2005) (THOMAS, J., dissenting). *Peretz* is both. Two considerations in particular convince me that *Peretz* should be overruled.

B

First, *Peretz* leaves the Court with no principled way to decide the statutory question presented in this case. Contrary to the Court's suggestion, the question presented here is not whether "every instance of waiver requires the personal consent of the client," *ante*, at 250; rather, it is the far narrower question whether § 636(b)(3) requires the defendant's personal consent before felony jury selection may be delegated to a magistrate judge. The Court answers this question in the negative, but does not point to anything in § 636(b)(3) or in the broader statutory scheme that supports its conclusion. It does not because it cannot. Not having provided for delegation of felony *voir dire* proceedings under the additional duties clause, Congress of course did not specify whether the parties' consent is required. And "[b]ecause the additional duties clause contains no language predicating delegation of an additional duty upon litigant consent, it likewise contains nothing indicating what constitutes 'consent' to the delegation of an additional duty." *Peretz*, *supra*, at 947, n. 6 (Marshall, J., dissenting).

Congress' silence is particularly telling in the context of the Federal Magistrates Act. Elsewhere in the Act, Congress took great care to specify whether and in what manner the litigants must consent before a magistrate judge may assume significant duties. In §636(c)(1), for example, Congress provided that full-time magistrate judges may conduct civil trials "[u]pon the consent of the parties," and that part-time magistrate judges may do so "[u]pon the consent of the parties, pursuant to their specific written request." Congress further provided in §636(c)(2) that "[t]he decision of the parties shall be communicated to the clerk of court," and, if the parties do not consent, the district judge may not raise the matter again without "advis[ing] the parties that they are free to withhold consent without adverse substantive consequences." I have previously explained at length why §636(c) is best read to require the express consent of the parties, see *Roell* v. *Withrow*, 538 U. S. 580, 591–597 (2003) (dissenting opinion), and I will not repeat that discussion here, other than to point out that Congress obviously focused on the issue and gave detailed instructions regarding the form of the parties' consent.

Even more telling is that Congress required the defendant's express, informed consent before a magistrate judge may conduct a misdemeanor trial. Section 636(a)(3) authorizes magistrate judges to conduct certain misdemeanor trials "in conformity with and subject to the limitations of" 18 U. S. C. §3401, which spells out in detail the manner in which the defendant must consent:

> "The magistrate judge shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a district judge and that he may have a right to trial by jury before a district judge or magistrate judge. The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judg-

ment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record." §3401(b).

The Court recites the language of §3401(b), but gives it no weight in its analysis. It recognizes that "[t]here are instances in federal criminal proceedings where the procedural requisites for consent are specified and a right cannot be waived except with a defendant's own informed consent." *Ante*, at 247. But it is given no pause by the fact that the Federal Magistrates Act, the very statute it interprets to permit delegation of *felony* proceedings without the defendant's "own informed consent," expressly requires such consent before a magistrate judge may conduct a *misdemeanor* trial. Instead, the Court worries that "requiring personal, on-the-record approval from the client could necessitate a lengthy explanation the client might not understand at the moment and that might distract from more pressing matters," *ante*, at 250, heedless of the fact that Congress plainly viewed any such "burden[s] [on] the trial process," *ante*, at 253, as outweighed by the need to obtain the defendant's personal consent before a magistrate judge may preside, even over a misdemeanor trial.

The Court glides over this glaring anomaly, asserting that "[t]he controlling statute in this case has a different design," and "does not state that consent to preside over felony *voir dire* must be granted by following a procedure of similar clarity." *Ante*, at 247. But there is only one statute at issue here—the Federal Magistrates Act expressly incorporates 18 U. S. C. §3401(b)—and the fact that it does not mandate "a procedure of similar clarity" for delegation of felony jury selection is hardly surprising, since §636(b)(3)—which provides in its entirety that "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States"—says not a word about delegation of felony jury selection, much less about whether and in what form the parties must consent.

The Court further suggests that §3401(b) is inconsequential because "there are relevant differences between presiding over a full trial and presiding over *voir dire*." *Ante*, at 252. But even *Peretz* recognized that "supervision of entire civil and misdemeanor trials" is "comparable in responsibility and importance to presiding over *voir dire* at a felony trial." 501 U. S., at 933. And of course, it was Congress' omission of any mode of consent for delegation of felony proceedings, in contradistinction to its detailed treatment of the consent required for delegation of civil and misdemeanor trials, that drove *Gomez*'s analysis. 490 U. S., at 872 ("[T]he carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial"); see also *Peretz*, *supra*, at 955 (SCALIA, J., dissenting) ("By specifically authorizing magistrates to perform duties in civil and misdemeanor trials, and specifying the manner in which parties were to express their consent in those situations, the statute suggested *absence* of authority to preside over felony trials through some (unspecified) mode of consent"). Today's decision is truly an ironic reversal. The Court once thought that Congress' differential treatment of felony jury selection and misdemeanor trials was a reason to believe that Congress had *entirely withheld* authority to preside over felony jury selection. Today, however, the Court says that the "relevant differences" between these responsibilities support the conclusion that Congress permitted delegation of felony jury selection upon a *lesser showing* of consent than that required for delegation of a misdemeanor trial.

In the end, I am sympathetic to petitioner's argument that §636(b)(3) should be read *in pari materia* with §3401(b). See Brief for Petitioner 38 ("If, in enacting the [Federal Magistrates Act,] Congress believed a defendant's explicit, personal consent was constitutionally necessary to bestow authority upon a magistrate judge in federal misdemeanor

cases, then *a fortiori* Congress would have believed that such explicit, personal consent is necessary to permit a magistrate judge to conduct felony jury selection"). And I share his view that Congress undoubtedly would have adopted something akin to §3401(b)'s requirements had it authorized delegation of felony jury selection. See *Peretz*, *supra*, at 947, n. 6 (Marshall, J., dissenting) ("I would think, however, that the standard governing a party's consent to delegation of a portion of a felony trial under the additional duties clause should be at least as strict as that governing delegation of a misdemeanor trial to a magistrate").

Nonetheless, I do not believe that *Peretz*'s erroneous interpretation of §636(b)(3) gives me license to rewrite the Federal Magistrates Act to reflect what I think Congress would have done had it contemplated delegation of felony jury selection or foreseen the Court's decision in *Peretz*. Cf. Brief for Petitioner 33 ("What the Court is left to do in petitioner's case is to fill the gap by determining what Congress would have done in enacting the [Federal Magistrates Act] had it expressly addressed the 'crucial' consent issue" (footnote omitted)). Where, as here, a mistaken interpretation of a statute leaves the Court with no principled way to answer subsequent questions that arise under the statute, it seems to me that the better course is simply to acknowledge and correct the error. Cf. *Kimbrough* v. *United States*, 552 U. S. 85, 116 (2007) (THOMAS, J., dissenting).

C

A second reason why I would not give *stare decisis* effect to *Peretz* is that it requires us to wade into a constitutional morass. In *Gomez*, the Court declined to decide whether the Constitution permits delegation of felony jury selection to a magistrate judge. 490 U. S., at 872, n. 25. *Peretz* simply brushed aside that difficult constitutional question. See 501 U. S., at 936 ("There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when

the litigants consent"); cf. *id.*, at 948–952 (Marshall, J., dissenting) (discussing the "serious constitutional question" "whether jury selection by a magistrate—even when a defendant consents—is consistent with Article III"); *id.*, at 956 (SCALIA, J., dissenting) (not resolving "the serious and difficult constitutional questions raised by the [majority's] construction," but suggesting that the Court's reasoning rendered "the doctrine of unconstitutional delegation" "a dead letter").

Today the Court's result requires it to go even further. In addition to reaffirming *Peretz*'s questionable holding that the Constitution permits delegation of felony *voir dire* proceedings to a non-Article III judge, the Court decides that a criminal defendant's waiver of his right to an Article III judge need not be personal and informed. The Court treats this as an easy question, concluding that the choice between an Article III judge and a magistrate judge is not among those "basic trial choices," *ante*, at 250, that require a defendant's personal consent because "a magistrate judge is capable of competent and impartial performance of the judicial tasks involved in jury examination and selection," and because magistrate judges are supervised by Article III judges, *ante*, at 251–252. Under our precedents, however, the question is not so easily dispatched.

Our cases shed little light on whether and when a criminal defendant must personally waive a constitutional right. Although we have previously stated that, "[f]or certain fundamental rights, the defendant must personally make an informed waiver," *New York* v. *Hill*, 528 U. S. 110, 114 (2000), many of the cases we have cited for that proposition do not in fact stand for it. For example, we have cited *Brookhart* v. *Janis*, 384 U. S. 1 (1966), for the proposition that the defendant's personal consent is required for a waiver of his right to plead not guilty. See, *e. g.*, *Hill*, *supra*, at 114. But *Brookhart*'s holding was narrower. The only question presented there was "whether counsel has power to enter a plea

which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him." 384 U. S., at 7 (emphasis added). *Brookhart* thus did not decide whether the Constitution prohibits counsel from entering a guilty plea on his client's behalf in cases where the defendant has not expressed a contrary desire.

Similarly, *Patton* v. *United States*, 281 U. S. 276 (1930), a case often cited for the proposition that the right to a jury trial can be waived only by the defendant personally, does not draw a clear distinction between the defendant's own consent and that of his attorney. The Court stated in dicta that "the express and intelligent consent of the defendant" is required "before any waiver [of the right to a jury trial] can become effective." *Id.*, at 312. But that requirement appears to have been satisfied in *Patton* by counsel's representation to the trial court that he had conferred with his clients and obtained their consent. *Id.*, at 286–287.

Our cases thus provide little relevant guidance. JUSTICE SCALIA may well be correct that, as a matter of first principles, there is no right (other than perhaps the *sui generis* right to counsel) that cannot be waived by a defendant's attorney, acting as the duly authorized agent of his client. See *ante*, at 257 (opinion concurring in judgment). But if I were to accept the Court's oft-repeated dictum that there are certain fundamental rights that can be waived only by the defendant personally, see, *e. g.*, *Florida* v. *Nixon*, 543 U. S. 175, 187 (2004) ("[C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate"); *Hill*, *supra*, at 114; *Taylor* v. *Illinois*, 484 U. S. 400, 417–418 (1988) ("[T]here are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client"), I see no reason why the right to an Article III judge should not be among them.

There is no apparent reason, for example, why the right to an Article III judge should be deemed any less fundamental, or its exercise any more "'tactical,'" *ante*, at 249 (opinion of the Court) (quoting *Taylor*, *supra*, at 418), than the right to a jury trial. The Framers viewed independent judges, no less than the right to a jury of one's peers, as indispensable to a fair trial. See, *e. g.*, *United States* v. *Hatter*, 532 U. S. 557, 568–569 (2001) (discussing the Framers' overriding concern for an independent Judiciary and quoting Chief Justice Marshall's statement that the "'greatest scourge . . . ever inflicted'" "'was an ignorant, a corrupt, or a dependent Judiciary'" (quoting Proceedings and Debates of the Virginia State Convention, of 1829–1830, p. 619 (1830))). For that reason, the Constitution affords Article III judges the structural protections of life tenure and salary protection. Art. III, § 1. The Court's observation that "a magistrate judge is capable of competent and impartial performance" of judicial duties, *ante*, at 251, is thus beside the point.* Mag-

*Equally beside the point is the fact that magistrate judges are appointed by, and subject to the supervision of, district judges. The Court reassures itself by hypothesizing that the District Court could have ruled on any objections to the Magistrate Judge's rulings. *Ante*, at 251–252. But the Court once "harbor[ed] serious doubts" that a district judge who was not present during jury selection could "meaningfully" review a magistrate judge's rulings, *Gomez* v. *United States*, 490 U. S. 858, 874 (1989), because "no transcript can recapture the atmosphere of the *voir dire*," *id.*, at 875. The Court does not explain what has intervened to dispel those doubts. And even if district judges could meaningfully review magistrate judges' *voir dire* rulings, that would not change the fact that magistrate judges are subject to outside influences in ways that Article III judges are not. As Judge Posner has explained:

"The fact that the appointing power has been given to Article III judges is the opposite of reassuring. It makes magistrates beholden to judges as well as to Congress. . . . The Constitution built internal checks and balances into the legislative branch by making Congress bicameral and into the judicial branch by guaranteeing all federal judges—not just Supreme Court Justices, or appellate judges generally—tenure during good behavior and protection against pay cuts. Appellate judges can reverse district judges, can mandamus them, can criticize them, can remand a case to another judge, but cannot fire district judges, cow them, or silence

istrate judges do not enjoy the structural protections of Article III: They serve 8-year terms and may be removed for cause, 28 U. S. C. §§631(e), (i), and they are subject to diminution of their salaries and outright abolition of their offices by Congress. Accordingly, whatever their virtues, magistrate judges are no substitute for Article III judges in the eyes of the Constitution.

In short, if I accepted the Court's dictum that the right to a jury trial may be waived only by the defendant personally, see, *e. g.*, *Nixon*, *supra*, at 187, I would be hard pressed to conclude that waiver of the right to an Article III judge during a critical stage of a felony trial requires anything less. That said, I include this brief discussion of the constitutional issues this case presents not because I would decide them, but to point out that the Court gives them short shrift. These are serious constitutional questions, see *Roell*, 538 U. S., at 595 (THOMAS, J., dissenting), and they are posed only because of *Peretz*'s erroneous interpretation of the Federal Magistrates Act. Indeed, I suspect that Congress withheld from magistrate judges the authority to preside during felony trials precisely in order to avoid the constitutional questions *Peretz* now thrusts upon us. Again, rather than plow headlong into this constitutional thicket, the better choice is simply to overrule *Peretz*. Cf. *Peretz*, 501 U. S., at 952 (Marshall, J., dissenting) (finding the Court's resolution of difficult Article III questions "particularly unfortunate" where "the most coherent reading of the Federal Magistrates Act avoids these problems entirely").

II

Because I conclude that *Peretz* should be overruled, and that the District Court therefore erred in delegating *voir*

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them—cannot prevent them from making independent judgments and expressing independent views. . . . [A]s long as [district judges] enjoy the tenure and compensation protections of Article III, they are independent of [those] who appointed them . . . . Magistrates do not have those protections; the judges control their reappointment." *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F. 2d 1037, 1053 (CA7 1984) (dissenting opinion).

dire to the Magistrate Judge, I must also address the Government's alternative argument that petitioner forfeited his claim by failing to object to the delegation. Petitioner's failure to object, the Government contends, means that he cannot prevail unless he satisfies the requirements of the plain-error rule. It is true that petitioner did not raise a timely objection to the District Court's delegation of *voir dire*. And petitioner cannot satisfy the plain-error rule because the statutory error below—unauthorized delegation of *voir dire* to a magistrate judge—was not "plain" under *Peretz*.

Not all uncontested errors, however, are subject to the plain-error rule. In limited circumstances, we have "agreed to correct, at least on direct review, violations of a statutory provision that embodies a strong policy concerning the proper administration of judicial business even though the defect was not raised in a timely manner." *Nguyen* v. *United States*, 539 U. S. 69, 78 (2003) (internal quotation marks omitted). In *Nguyen*, a non-Article III judge sat by designation on the Ninth Circuit panel that affirmed petitioners' convictions. Petitioners failed to object to the composition of the panel in the Ninth Circuit and raised the issue for the first time in their petitions for certiorari. Because the Ninth Circuit panel "contravened the statutory requirements set by Congress for the composition of the federal courts of appeals," *id.*, at 80, and because those requirements "embodie[d] weighty congressional policy concerning the proper organization of the federal courts," *id.*, at 79, we held that petitioners' failure to object did not preclude relief. We specifically declined to apply the plain-error rule:

> "It is true, as the Government observes, that a failure to object to trial error ordinarily limits an appellate court to review for plain error. See 28 U. S. C. §2111; Fed. Rule Crim. Proc. 52(b). But to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite

> carefully withheld. Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel." *Id.*, at 80–81.

I see no reason to treat this case differently than *Nguyen*. Just as "Congress' decision to preserve the Article III character of the courts of appeals [was] more than a trivial concern" in that case, *id.*, at 80, so too here Congress' decision to preserve the Article III character of felony trials "embodies weighty congressional policy concerning the proper organization of the federal courts," *id.*, at 79. Accordingly, as in *Nguyen*, the Court can and should correct the error in this case despite petitioner's failure to raise a timely objection below.

III

For the reasons stated, I would reverse the judgment of the Court of Appeals and remand for a new trial.

Syllabus

UNITED STATES *v.* RESSAM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–455. Argued March 25, 2008—Decided May 19, 2008

After respondent gave false information on his customs form while attempting to enter the United States, a search of his car revealed explosives that he intended to detonate in this country. He was convicted of, *inter alia*, (1) feloniously making a false statement to a customs official in violation of 18 U. S. C. § 1001, and (2) "carr[ying] an explosive during the commission of" that felony in violation of § 844(h)(2). The Ninth Circuit set aside the latter conviction because it read "during" in § 844(h)(2) to include a requirement that the explosive be carried "in relation to" the underlying felony.

Held: Since respondent was carrying explosives when he violated § 1001, he was carrying them "during" the commission of that felony. The most natural reading of § 844(h)(2) provides a sufficient basis for reversal. It is undisputed that the items in respondent's car were "explosives," and that he was "carr[ying]" those explosives when he knowingly made false statements to a customs official in violation of § 1001. Dictionary definitions need not be consulted to arrive at the conclusion that he engaged in § 844(h)(2)'s precise conduct. "[D]uring" denotes a temporal link. Because his carrying of explosives was contemporaneous with his § 1001 violation, he carried them "during" that violation. The statute's history further supports the conclusion that Congress did not intend a relational requirement in § 844(h) as presently written. Pp. 274–277.

474 F. 3d 597, reversed.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, GINSBURG, and ALITO, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Part I. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined, *post*, p. 277. BREYER, J., filed a dissenting opinion, *post*, p. 277.

Attorney General Mukasey argued the cause for the United States. On the briefs were *Solicitor General Clement*, *Assistant Attorney General Wainstein*, *Deputy Solicitor General Dreeben*, *Toby J. Heytens*, and *John F. De Pue*.

Thomas W. Hillier II argued the cause for respondent. With him on the brief were *Laura E. Mate* and *Lissa Wolfendale Shook*.*

JUSTICE STEVENS delivered the opinion of the Court.

Respondent attempted to enter the United States by car ferry at Port Angeles, Washington. Hidden in the trunk of his rental car were explosives that he intended to detonate at the Los Angeles International Airport. After the ferry docked, respondent was questioned by a customs official, who instructed him to complete a customs declaration form; respondent did so, identifying himself on the form as a Canadian citizen (he is Algerian) named Benni Noris (his name is Ahmed Ressam). Respondent was then directed to a secondary inspection station, where another official performed a search of his car. The official discovered explosives and related items in the car's spare tire well.

Respondent was subsequently convicted of a number of crimes, including the felony of making a false statement to a United States customs official in violation of 18 U. S. C. § 1001 (1994 ed., Supp. V) (Count 5) and carrying an explosive "during the commission of" that felony in violation of § 844(h)(2) (1994 ed.) (Count 9). The Court of Appeals for the Ninth Circuit set aside his conviction on Count 9 because it read the word "during," as used in § 844(h)(2), to include a requirement that the explosive be carried "in relation to" the underlying felony. 474 F. 3d 597, 601 (2007). Because that construction of the statute conflicted with decisions of other Courts of Appeals, we granted certiorari.[1] 552 U. S. 1074 (2007).

**Donald B. Ayer*, *Samuel Estreicher*, *Meir Feder*, and *Jeffrey L. Fisher* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

[1] Both the Third and Fifth Circuits have declined to interpret § 844(h)(2) as requiring that the explosive be carried in relation to the underlying felony. See *United States* v. *Rosenberg*, 806 F. 2d 1169, 1178–1179 (CA3 1986) ("The plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of' . . . . It does not normally mean 'at the same

I

The most natural reading of the relevant statutory text provides a sufficient basis for reversal. That text reads:

> "Whoever—
>
> "(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or
>
> "(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,
>
> "including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years." 18 U. S. C. §844(h).

It is undisputed that the items hidden in respondent's car were "explosives."[2] It is also undisputed that respondent was "carr[ying]" those explosives when he knowingly made false statements to a customs official, and that those statements violated § 1001 (1994 ed., Supp. V).

There is no need to consult dictionary definitions of the word "during" in order to arrive at the conclusion that respondent engaged in the precise conduct described in §844(h)(2) (1994 ed.). The term "during" denotes a temporal link; that is surely the most natural reading of the word

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time and in connection with . . . .' It is not fitting for this court to declare that the crime defined by §844(h)(2) has more elements than those enumerated on the face of the statute"); *United States* v. *Ivy*, 929 F. 2d 147, 151 (CA5 1991) ("Section 844(h)(2) . . . does not include the relation element Ivy urges . . . . We . . . refuse to judicially append the relation element to §844(h)(2)").

[2] Because respondent concedes that the items in his car were "explosives," we have no occasion to determine the boundaries of that term as used in the statute. Specifically, we do not comment on when, if ever, "such commonplace materials as kerosene, gasoline, or certain fertilizers," *post*, at 278 (BREYER, J., dissenting), might fall within the definition of "explosive."

as used in the statute. Because respondent's carrying of the explosives was contemporaneous with his violation of § 1001, he carried them "during" that violation.

II

The history of the statute we construe today further supports our conclusion that Congress did not intend to require the Government to establish a relationship between the explosive carried and the underlying felony. Congress originally enacted § 844(h)(2) as part of its "Regulation of Explosives" in Title XI of the Organized Crime Control Act of 1970, 84 Stat. 957. The provision was modeled after a portion of the Gun Control Act of 1968, § 102, 82 Stat. 1224, codified, as amended, at 18 U. S. C. § 924(c) (2000 ed. and Supp. V). The earlier statute mandated at least 1 and no more than 10 years' imprisonment for any person who "carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States." 18 U. S. C. § 924(c)(2) (1964 ed., Supp. IV). Except for the word "explosive" in § 844(h)(2), instead of the word "firearm" in § 924(c)(2), the two provisions as originally enacted were identical.

In 1984, Congress redrafted the firearm statute; it increased the penalties attached to the provision and, most significantly for our purposes, deleted the word "unlawfully" and inserted the words "and in relation to" immediately after the word "during." § 1005(a), 98 Stat. 2138. Reviewing a conviction for an offense that was committed before the amendment but not decided on appeal until after its enactment, the Ninth Circuit held that the original version of the firearm statute had implicitly included the "in relation to" requirement that was expressly added while the case was pending on appeal. As then-Judge Kennedy explained:

> "The statute as written when Stewart committed the offense provided in pertinent part that it was a crime to 'carr[y] a firearm unlawfully during the commission of any felony . . . .' 18 U. S. C. § 924(c)(2) (1982). In 1984,

> Congress revised section 924(c) . . . . The 1984 amendment substituted for the word 'during' the phrase 'during *and in relation to*.' 18 U. S. C. A. § 924(c) (West Supp. 1985) (emphasis added). Our study of the legislative history of the amendment . . . indicates the 'in relation to' language was not intended to create an element of the crime that did not previously exist, but rather was intended to make clear a condition already implicit in the statute. The legislative history reveals that because the amendment eliminated the requirement that the firearm be carried unlawfully, 18 U. S. C. A. § 924(c) (West Supp. 1985), the 'in relation to' language was added to allay explicitly the concern that a person could be prosecuted under section 924(c) for committing an entirely unrelated crime while in possession of a firearm. Though the legislative history does not say so expressly, it strongly implies that the 'in relation to' language did not alter the scope of the statute . . . ." *United States* v. *Stewart*, 779 F. 2d 538, 539–540 (1985) (citations omitted).

Relying on that Circuit precedent, the Court of Appeals in this case concluded that the explosives statute, like the firearm statute, implicitly included a requirement of a relationship between possession of the item in question and the underlying felony. Whatever the merits of the argument that § 924(c) as originally enacted contained a relational requirement, the subsequent changes to both statutes convince us that the Government's reading of § 844(h) as presently written is correct.

III

In 1988, Congress enacted the "Explosives Offenses Amendments," § 6474(b), 102 Stat. 4379, which modified the text of § 844(h). Those amendments increased the penalties for violating the provision, § 6474(b)(2), *id.*, at 4380; they also deleted the word "unlawfully," § 6474(b)(1), *ibid.* Unlike its

earlier amendment to the firearm statute, however, Congress did not also insert the words "and in relation to" after the word "during." While it is possible that this omission was inadvertent, that possibility seems remote given the stark difference that was thereby introduced into the otherwise similar texts of 18 U. S. C. §§844(h) and 924(c).

Even if the similarity of the original texts of the two statutes might have supported an inference that both included an implicit relationship requirement, their current difference virtually commands the opposite inference. While the two provisions were initially identical, Congress' replacement of the word "unlawfully" in the firearm statute with the phrase "and in relation to," coupled with the deletion of the word "unlawfully" without any similar replacement in the explosives statute, convinces us that Congress did not intend to introduce a relational requirement into the explosives provision, but rather intended us to accept the more straightforward reading of §844(h). Since respondent was carrying explosives when he violated §1001, he was carrying them "during" the commission of that felony. The statute as presently written requires nothing further.

Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in part and concurring in the judgment.

Because the plain language of the statute squarely answers the question presented in this case, I join only Part I of the Court's opinion.

JUSTICE BREYER, dissenting.

The statute before us imposes a mandatory 10-year sentence on any person who "carries an explosive during the commission of any [federal] felony." 18 U. S. C. §844(h)(2). The Ninth Circuit interpreted the statute as requiring a "re-

lation" between the explosives carrying and the felony (here, making a false statement to a customs officer), such that the explosives carrying "'facilitated'" or "aided" the commission of the felony. 474 F. 3d 597, 604 (2007). The Court interprets the statute to the contrary. It holds that the statute requires no more than a "temporal link" between the explosives carrying and the felony, that is to say, the two need only have occurred at the same time. See *ante*, at 274. I cannot agree with either interpretation.

I

My problem with the Court's interpretation is that it would permit conviction of any individual who legally carries explosives at the time that he engages in a totally unrelated felony. "Explosives," the statute tells us, includes not only obviously explosive material such as "gunpowders" and "dynamite" but also any "chemical compounds" or "mixture[s]" or "device[s]" whose "ignition by fire, by friction, by concussion" or other means "may cause an explosion." 18 U. S. C. §844(j). And that definition encompasses such commonplace materials as kerosene, gasoline, or certain fertilizers. Moreover, the "carr[ying]" to which the statute refers includes carrying that is otherwise legal. Further, the statute applies to the carrying of explosives during "any" federal felony, a category that ranges from murder to mail fraud. See §1111 (2000 ed. and Supp. V); §1341 (2000 ed., Supp. V).

Consequently the Court's opinion brings within the statute's scope (and would impose an additional mandatory 10-year prison term upon), for example, a farmer lawfully transporting a load of fertilizer who intentionally mails an unauthorized lottery ticket to a friend, a hunter lawfully carrying gunpowder for shotgun shells who buys snacks with a counterfeit $20 bill, a truckdriver lawfully transporting diesel fuel who lies to a customs official about the value of presents he bought in Canada for his family, or an accountant

who engaged in a 6-year-long conspiracy to commit tax evasion and who, one day during that conspiracy, bought gas for his lawnmower. In such instances the lawful carrying of an "explosive" has *nothing whatsoever* to do with the unlawful felonies. I cannot imagine why Congress would have wanted the presence of totally irrelevant, lawful behavior to trigger an additional 10-year mandatory prison term.

The statute's language does not demand such an interpretation. I agree with the majority that the word "during" requires a "temporal link." See *ante*, at 274. But a statement that uses the word "during" may or may not imply *other* limitations as well, depending upon the context in which the statement is made. Thus, when I tell a friend from Puerto Rico, "I wear gloves during Washington's winter," he does not think I mean baseball mitts. Rather, I imply (and he understands) a relation or link between the gloves and the winter. When I say to a group of lawyers, "I take notes during oral argument," I imply (and they understand) that the notes bear a relation to the law being argued. But when I say, "I called my brother during the day," I do not imply any particular relation (other than a temporal relation) between the day and the phone call. Context makes the difference.

Here, the statute's context makes clear that the statutory statement does not cover a "carr[ying]" of explosives that is totally unrelated to the "felony." The lengthy mandatory minimum sentence is evidence of what the statute's legislative history separately indicates, namely, that Congress sought to criminalize and impose harsh penalties in respect to the "intentional *misuse* of explosives," see H. R. Rep. No. 91–1549, p. 38 (1970) (hereinafter H. R. Rep.) (emphasis added). A person who *lawfully* carries explosives while committing some other felony does not even arguably "misuse" those explosives unless the carrying has something to do with the other felony. Nor in the absence of some such rela-

tionship is there any obvious reason to impose an additional mandatory 10-year sentence on a person who *unlawfully* carries explosives while committing some other felony.

Similar reasoning led the Ninth Circuit in 1985 to interpret a related statute, which punished the carrying of a *firearm* "during" the commission of a federal felony, as requiring a significant relationship between the firearms carrying and the other felony. See *United States* v. *Stewart*, 779 F. 2d 538. JUSTICE (then-Judge) KENNEDY recognized that "'Congress did not intend to penalize one who happens to have a gun in his possession when he commits an entirely unrelated offense.'" *Id.*, at 540 (quoting *United States* v. *Moore*, 580 F. 2d 360, 362 (CA9 1978)). In my view, that same reasoning should apply when we interpret the explosives statute, which was originally modeled on the firearms statute. See H. R. Rep., at 69 (the explosives statute "carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a Federal felony").

I recognize that the language of the firearms statute now differs from the language of the explosives statute in an important way. The firearms statute originally punished (with a 1-to-10-year sentence) a person who "carries a firearm unlawfully during the commission of any [federal] felony." 18 U. S. C. §924(c)(2) (1964 ed., Supp. IV). In 1984, Congress amended the firearms statute by providing a mandatory minimum punishment of five years and by striking the word "unlawfully." §1005(a), 98 Stat. 2138. When it did so, Congress also added to the statute specific words of limitation, namely, the words "and in relation to" (so that the statute covered any person who carried a firearm "during and in relation to" the commission of a "felony"). *Ibid.*

The words "in relation to" do not appear in the explosives statute. But neither did those words appear in the pre-1984

version of the firearms statute that was the subject of the Ninth Circuit opinion in *Stewart* (yet the Ninth Circuit nonetheless found an implicit relational requirement). And the fact that these words now appear in the firearms statute but not the explosives statute cannot make the determinative difference.

The history of the firearms statute makes clear that the reason Congress added to that statute the words "in relation to" has to do with Congress' decision to remove from the firearms statute the word "unlawfully." By removing that word, Congress indicated that the firearms statute should apply to "persons who are licensed to carry firearms" but who "abuse that privilege by committing a crime with the weapon." S. Rep. No. 98–225, p. 314, n. 10 (1983). At the same time, however, Congress believed that the statute should not apply where the firearm's presence "played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." *Ibid.* The addition of the words "in relation to" made this dual objective textually clear.

The absence of the words "in relation to" here must lead us to ask (but it does not answer) the question: Did Congress intend something different in respect to the explosives statute? There are strong reasons for thinking it did not. Congress, after all, amended the explosives statute in response to the Department of Justice's express request to "bring" the explosives statute "in line with" the firearms statute. See 131 Cong. Rec. 14166 (1985); see also 134 Cong. Rec. 32700 (1988) (statement of Sen. Biden) (noting that the purpose of amending the explosives statute was to "bring it in line with similar amendments [previously] adopted . . . with respect to the parallel offense of using or carrying a firearm during the commission of federal offenses"). Congress accordingly increased the mandatory minimum punishment to five years and struck the word "unlawfully." See §6474(b),

102 Stat. 4379–4380. If Congress, in neglecting to add the words "in relation to," sought to create a meaningful distinction between the explosives and firearms statutes, one would think that someone somewhere would have mentioned this objective.

Further, to read the two statutes differently would break the very parallel treatment of firearms and explosives that led Congress, at the Department of Justice's urging, to amend the explosives statute in the first place. It would produce the peculiar and unfair results I previously mentioned. See *supra*, at 278–279. It would conflict with Congress' original rationale for enacting the explosives statute (to punish the *misuse* of explosives). And it would risk incoherent results: Why would Congress wish not to punish a policeman for carrying an unrelated revolver during the commission of a felony, but then wish to punish that same policeman for carrying unrelated gunpowder for unrelated bullets?

At the same time one can explain the absence of the words "in relation to" in less damaging ways. The legislative drafters of the explosives amendment may have assumed that prior judicial interpretation (namely, *United States* v. *Stewart*, *supra*) made the words "in relation to" unnecessary. See *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Or, as the majority recognizes, the omission of the language may reflect simple drafting inadvertence. See *ante*, at 277.

I concede that the presence of a phrase in one statute and the absence of the same phrase in another related statute can signal an intended difference in relative statutory scope. But that is not inevitably so. Cf. *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (noting only a *presumption* that Congress has acted intentionally and purposely if it "includes particular language in one section of a statute but omits it in another section of the same Act" (internal quotation marks

omitted)). And here the circumstances that I have mentioned make this a case in which that linguistic fact is not determinative.

No more here than elsewhere in life can words alone explain every nuance of their intended application. Context matters. And if judges are to give meaningful effect to the intent of the enacting legislature, they must interpret statutory text with reference to the statute's purpose and its history.

The Court, with its decision today, makes possible the strange results I describe above precisely because it resolves the statutory interpretation question by examining the meaning of just one word in isolation. In context, however, the language excludes from the statute's scope instances in which there is no significant relation between the explosives carrying and the felony. A contextual interpretation furthers Congress' original purpose, is less likely to encourage random punishment, and is consistent with the statute's overall history. As a result, like the Ninth Circuit, I would read the statute as insisting upon some (other than merely temporal) relationship between explosives carrying and "felony."

II

At the same time, I cannot agree with the Ninth Circuit that the statute restricts the requisite relationship to one in which the carrying of the explosives "'facilitated'" (or "aided") the *felony*. 474 F. 3d, at 604. In my view, the statute must also cover a felony committed to facilitate the *carrying of explosives*. Why should it matter in which direction the facilitating flows? Either way, there is a relation between the carrying of explosives and the other felony. Either way, one might reasonably conclude that the presence of the explosives will elevate the risks of harm that otherwise would ordinarily arise out of the felony's commission. Either way, one might consider the explosives "misused." Thus, I believe the statute applies if the felony, here, the

making of a false statement to a customs officer, facilitated or aided the carrying of explosives. And I would remand the case for the Circuit to determine the presence or absence of that relevant relation.

For these reasons, I respectfully dissent.

Syllabus

UNITED STATES *v.* WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06–694. Argued October 30, 2007—Decided May 19, 2008

After this Court found facially overbroad a federal statutory provision criminalizing the possession and distribution of material pandered as child pornography, regardless of whether it actually was that, *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, Congress passed the pandering and solicitation provision at issue, 18 U. S. C. §2252A(a)(3)(B). Respondent Williams pleaded guilty to this offense and others, but reserved the right to challenge his pandering conviction's constitutionality. The District Court rejected his challenge, but the Eleventh Circuit reversed, finding the statute both overbroad under the First Amendment and impermissibly vague under the Due Process Clause.

Held:

1. Section 2252A(a)(3)(B) is not overbroad under the First Amendment. Pp. 292–304.

(a) A statute is facially invalid if it prohibits a substantial amount of protected speech. Section 2252A(a)(3)(B) generally prohibits offers to provide and requests to obtain child pornography. It targets not the underlying material, but the collateral speech introducing such material into the child-pornography distribution network. Its definition of material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *New York* v. *Ferber*, 458 U. S. 747, and *Miller* v. *California*, 413 U. S. 15: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct. The statute's important features include: (1) a scienter requirement; (2) operative verbs that are reasonably read to penalize speech that accompanies or seeks to induce a child-pornography transfer from one person to another; (3) a phrase—"in a manner that reflects the belief," *ibid.*—that has both the subjective component that the defendant must actually have held the "belief" that the material or purported material was child pornography, and the objective component that the statement or action must manifest that belief; (4) a phrase—"in a manner . . . that is intended to cause another to believe," *ibid.*—that has only the subjective element that the defendant must "in-

Syllabus

tend" that the listener believe the material to be child pornography; and (5) a "sexually explicit conduct" definition that is very similar to that in the New York statute upheld in *Ferber*. Pp. 292–297.

(b) As thus construed, the statute does not criminalize a substantial amount of protected expressive activity. Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *E. g., Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 388. The Eleventh Circuit mistakenly believed that this exclusion extended only to commercial offers to provide or receive contraband. The exclusion's rationale, however, is based not on the less privileged status of commercial speech, but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus enjoy no First Amendment protection. The constitutional defect in *Free Speech Coalition*'s pandering provision was that it went beyond pandering to prohibit possessing material that could not otherwise be proscribed. The Eleventh Circuit's erroneous conclusion led it to apply strict scrutiny to § 2252A(a)(3)(B), lodging three fatal objections that lack merit. Pp. 297–304.

2. Section 2252A(a)(3)(B) is not impermissibly vague under the Due Process Clause. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill* v. *Colorado*, 530 U. S. 703, 732. In the First Amendment context plaintiffs may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494–495, and nn. 6 and 7. The Eleventh Circuit mistakenly believed that "in a manner that reflects the belief" and "in a manner . . . that is intended to cause another to believe" were vague and standardless phrases that left the public with no objective measure of conformance. What renders a statute vague, however, is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is. See, *e. g., Coates* v. *Cincinnati*, 402 U. S. 611, 614. There is no such indeterminacy here. The statute's requirements are clear questions of fact. It may be difficult in some cases to determine whether the requirements have been met, but courts and juries every day pass upon the reasonable import of a defendant's statements and upon "knowledge, belief and intent." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411. Pp. 304–307.

444 F. 3d 1286, reversed.

Syllabus

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 307. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 310.

Solicitor General Clement argued the cause for the United States. With him on the briefs were *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, *Deanne E. Maynard*, and *Deborah Watson*.

Richard J. Diaz argued the cause for respondent. With him on the brief were *Ophelia M. Valls*, *Luis I. Guerra*, and *G. Richard Strafer*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Troy King*, Attorney General of Alabama, *Kevin C. Newsom*, Solicitor General, and *James W. Davis*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Paul J. Morrison* of Kansas, *G. Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jon Bruning* of Nebraska, *Kelly A. Ayotte* of New Hampshire, *Gary King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William Sorrell* of Vermont, *Robert F. McDonnell* of Virginia, *Robert M. McKenna* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *James M. Henderson*, *Walter M. Weber*, *John P. Tuskey*, and *Laura B. Hernandez*; for the Lighted Candle Society et al. by *Gene C. Schaerr*, *Steffen N. Johnson*, and *Linda T. Coberly*; for Morality in Media, Inc., by *Robin S. Whitehead*; for the National Law Center for Children and Families et al. by *Daniel P. Collins* and *Fred A. Rowley, Jr.*; for the National Legal Foundation by *Steven W. Fitschen* and *Barry C. Hodge*; and for the Rutherford Institute by *John W. Whitehead*.

Briefs of *amici curiae* urging affirmance were filed for the American Booksellers Foundation for Free Expression et al. by *Michael A. Bamberger* and *Jonathan Bloom*; for the Free Speech Coalition et al. by

JUSTICE SCALIA delivered the opinion of the Court.

Section 2252A(a)(3)(B) of Title 18, United States Code, criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography. This case presents the question whether that statute is overbroad under the First Amendment or impermissibly vague under the Due Process Clause of the Fifth Amendment.

I

A

We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment. See *Roth* v. *United States*, 354 U. S. 476, 484–485 (1957). But to protect explicit material that has social value, we have limited the scope of the obscenity exception, and have overturned convictions for the distribution of sexually graphic but nonobscene material. See *Miller* v. *California*, 413 U. S. 15, 23–24 (1973); see also, *e. g.*, *Jenkins* v. *Georgia*, 418 U. S. 153, 161 (1974).

Over the last 25 years, we have confronted a related and overlapping category of proscribable speech: child pornography. See *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234 (2002); *Osborne* v. *Ohio*, 495 U. S. 103 (1990); *New York* v. *Ferber*, 458 U. S. 747 (1982). This consists of sexually explicit visual portrayals that feature children. We have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment. See *id.*, at 751–753, 756–764. Moreover, we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults. Compare *Os-*

H. Louis Sirkin and *John P. Feldmeier*; and for the National Coalition Against Censorship et al. by *Katherine A. Fallow* and *Joan E. Bertin*.

borne, *supra*, at 111, with *Stanley* v. *Georgia*, 394 U. S. 557, 568 (1969).

The broad authority to proscribe child pornography is not, however, unlimited. Four Terms ago, we held facially overbroad two provisions of the federal Child Pornography Prevention Act of 1996 (CPPA). *Free Speech Coalition*, 535 U. S., at 258. The first of these banned the possession and distribution of "'any visual depiction'" that "'is, or appears to be, of a minor engaging in sexually explicit conduct,'" even if it contained only youthful-looking adult actors or virtual images of children generated by a computer. *Id.*, at 239–241 (quoting 18 U. S. C. §2256(8)(B)). This was invalid, we explained, because the child-protection rationale for speech restriction does not apply to materials produced without children. See 535 U. S., at 249–251, 254. The second provision at issue in *Free Speech Coalition* criminalized the possession and distribution of material that had been pandered as child pornography, regardless of whether it actually was that. See *id.*, at 257 (citing 18 U. S. C. §2256(8)(D)). A person could thus face prosecution for possessing unobjectionable material that someone else had pandered. 535 U. S., at 258. We held that this prohibition, which did "more than prohibit pandering," was also facially overbroad. *Ibid.*

After our decision in *Free Speech Coalition*, Congress went back to the drawing board and produced legislation with the unlikely title of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 117 Stat. 650. We shall refer to it as the Act. Section 503 of the Act amended 18 U. S. C. §2252A to add a new pandering and solicitation provision, relevant portions of which now read as follows:

> "(a) Any person who—
>
> . . . . .
>
> "(3) knowingly—
>
> . . . . .
>
> "(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign

> commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—
>
> "(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> "(ii) a visual depiction of an actual minor engaging in sexually explicit conduct,
>
> . . . . .
>
> "shall be punished as provided in subsection (b)." § 2252A(a)(3)(B) (2000 ed., Supp. V).

Section 2256(2)(A) defines "'sexually explicit conduct'" as

> "actual or simulated—
>
> "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> "(ii) bestiality;
>
> "(iii) masturbation;
>
> "(iv) sadistic or masochistic abuse; or
>
> "(v) lascivious exhibition of the genitals or pubic area of any person."

Violation of § 2252A(a)(3)(B) incurs a minimum sentence of 5 years imprisonment and a maximum of 20 years. 18 U. S. C. § 2252A(b)(1).

The Act's express findings indicate that Congress was concerned that limiting the child-pornography prohibition to material that could be *proved* to feature actual children, as our decision in *Free Speech Coalition* required, would enable many child pornographers to evade conviction. See § 501(9), (10), 117 Stat. 677. The emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children—even though "[t]here is no substantial evidence that any of the child por-

nography images being trafficked today were made other than by the abuse of real children," virtual imaging being prohibitively expensive. §501(5), (7), (8), (11), *id.*, at 676–678; see also Dept. of Justice, Office of Community Oriented Policing Services, R. Wortley & S. Smallbone, Child Pornography on the Internet 9 (May 2006), online at http://www.cops.usdoj.gov/mime/open.pdf?Item=1729 (hereinafter Child Pornography on the Internet) (as visited Jan. 7, 2008, and available in Clerk of Court's case file).

B

The following facts appear in the opinion of the Eleventh Circuit, 444 F. 3d 1286, 1288 (2006). On April 26, 2004, respondent Michael Williams, using a sexually explicit screen name, signed in to a public Internet chat room. A Secret Service agent had also signed in to the chat room under the moniker "Lisa n Miami." The agent noticed that Williams had posted a message that read: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." The agent struck up a conversation with Williams, leading to an electronic exchange of nonpornographic pictures of children. (The agent's picture was in fact a doctored photograph of an adult.) Soon thereafter, Williams messaged that he had photographs of men molesting his 4-year-old daughter. Suspicious that "Lisa n Miami" was a law-enforcement agent, before proceeding further Williams demanded that the agent produce additional pictures. When he did not, Williams posted the following public message in the chat room: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT." Appended to this declaration was a hyperlink that, when clicked, led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals. The Secret Service then obtained a search warrant for Williams's home, where agents seized two hard

drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic.

Williams was charged with one count of pandering child pornography under §2252A(a)(3)(B) and one count of possessing child pornography under §2252A(a)(5)(B). He pleaded guilty to both counts but reserved the right to challenge the constitutionality of the pandering conviction. The District Court rejected his challenge, and imposed concurrent 60-month prison terms on the two counts and a statutory assessment of $100 for each count, see 18 U. S. C. §3013. No. 04–20299–CR–MIDDLEBROOKS (SD Fla., Aug. 20, 2004), App. B to Pet. for Cert. 46a–69a. The United States Court of Appeals for the Eleventh Circuit reversed the pandering conviction, holding that the statute was both overbroad and impermissibly vague. 444 F. 3d, at 1308–1309.

We granted certiorari. 549 U. S. 1304 (2007).

II

A

According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. *Virginia* v. *Hicks*, 539 U. S. 113, 119–120 (2003). On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. See *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 485

(1989); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973). Invalidation for overbreadth is "'"strong medicine"'" that is not to be "casually employed." *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 39 (1999) (quoting *Ferber*, 458 U. S., at 769).

The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers. Generally speaking, §2252A(a)(3)(B) prohibits offers to provide and requests to obtain child pornography. The statute does not require the actual existence of child pornography. In this respect, it differs from the statutes in *Ferber*, *Osborne*, and *Free Speech Coalition*, which prohibited the possession or distribution of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute.

The statute's definition of the material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct. See *Free Speech Coalition*, 535 U. S., at 245–246 (stating that the First Amendment does not protect obscenity or pornography produced with actual children); *id.*, at 256 (holding invalid the challenged provision of the CPPA because it "cover[ed] materials beyond the categories recognized in *Ferber* and *Miller*").

A number of features of the statute are important to our analysis:

First, the statute includes a scienter requirement. The first word of §2252A(a)(3)—"knowingly"—applies to both of the immediately following subdivisions, both the previously existing §2252A(a)(3)(A)[1] and the new §2252A(a)(3)(B) at issue here. We think that the best reading of the term in context is that it applies to every element of the two provisions. This is not a case where grammar or structure enables the challenged provision or some of its parts to be read apart from the "knowingly" requirement. Here "knowingly" introduces the challenged provision itself, making clear that it applies to that provision in its entirety; and there is no grammatical barrier to reading it that way.

Second, the statute's string of operative verbs—"advertises, promotes, presents, distributes, or solicits"—is reasonably read to have a transactional connotation. That is to say, the statute penalizes speech that accompanies or seeks to induce a transfer of child pornography—via reproduction or physical delivery—from one person to another. For three of the verbs, this is obvious: Advertising, distributing, and soliciting are steps taken in the course of an actual or proposed transfer of a product, typically but not exclusively in a commercial market. When taken in isolation, the two remaining verbs—"promotes" and "presents"—are susceptible of multiple and wide-ranging meanings. In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated. See *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961); 2A N. Singer & J. Singer, Sutherland Statutes and Statutory Construction §47:16 (7th ed. 2007). "Promotes," in a list that includes "solicits," "distributes," and "advertises," is most sensibly read to mean the act of recommending purported child pornography to another per-

[1] Section 2252A(a)(3)(A) (2000 ed., Supp. V) reads: "reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer."

son for his acquisition. See American Heritage Dictionary 1403 (4th ed. 2000) (def. 4: "To attempt to sell or popularize by advertising or publicity"). Similarly, "presents," in the context of the other verbs with which it is associated, means showing or offering the child pornography to another person with a view to his acquisition. See *id.*, at 1388 (def. 3a: "To make a gift or award of"). (The envisioned acquisition, of course, could be an electronic one, for example, reproduction of the image on the recipient's computer screen.)

To be clear, our conclusion that all the words in this list relate to transactions is not to say that they relate to *commercial* transactions. One could certainly "distribute" child pornography without expecting payment in return. Indeed, in much Internet file sharing of child pornography each participant makes his files available for free to other participants—as Williams did in this case. "Distribution may involve sophisticated pedophile rings or organized crime groups that operate for profit, but in many cases, is carried out by individual amateurs who seek no financial reward." Child Pornography on the Internet 9. To run afoul of the statute, the speech need only accompany or seek to induce the transfer of child pornography from one person to another.

Third, the phrase "in a manner that reflects the belief" includes both subjective and objective components. "[A] manner that reflects the belief" is quite different from "a manner that would give one cause to believe." The first formulation suggests that the defendant must actually have held the subjective "belief" that the material or purported material was child pornography. Thus, a misdescription that leads the listener to believe the defendant is offering child pornography, when the defendant in fact does not believe the material is child pornography, does not violate this prong of the statute. (It may, however, violate the "manner . . . that is intended to cause another to believe" prong if the misdescription is intentional.) There is also an objective

component to the phrase "manner that reflects the belief." The statement or action must objectively manifest a belief that the material is child pornography; a mere belief, without an accompanying statement or action that would lead a reasonable person to understand that the defendant holds that belief, is insufficient.

Fourth, the other key phrase, "in a manner . . . that is intended to cause another to believe," contains only a subjective element: The defendant must "intend" that the listener believe the material to be child pornography, and must select a manner of "advertising, promoting, presenting, distributing, or soliciting" the material that *he* thinks will engender that belief—whether or not a reasonable person would think the same. (Of course in the ordinary case the proof of the defendant's intent will be the fact that, as an objective matter, the manner of "advertising, promoting, presenting, distributing, or soliciting" plainly sought to convey that the material was child pornography.)

Fifth, the definition of "sexually explicit conduct" (the visual depiction of which, engaged in by an actual minor, is covered by the Act's pandering and soliciting prohibition even when it is not obscene) is very similar to the definition of "sexual conduct" in the New York statute we upheld against an overbreadth challenge in *Ferber*. That defined "sexual conduct" as "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.'" 458 U. S., at 751. Congress used essentially the same constitutionally approved definition in the present Act. If anything, the fact that the defined term here is "sexually *explicit* conduct," rather than (as in *Ferber*) merely "sexual conduct," renders the definition more immune from facial constitutional attack. "[S]imulated sexual intercourse" (a phrase found in the *Ferber* definition as well) is even less susceptible here of application to the sorts of sex scenes found in R-rated movies—which suggest that intercourse is taking place with-

out explicitly depicting it, and without causing viewers to believe that the actors are actually engaging in intercourse. "Sexually *explicit* conduct" connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And "simulated" sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically, unlike in *Free Speech Coalition*, § 2252A(a)(3)(B)(ii)'s requirement of a "visual depiction of an actual minor" makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This change eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse."

B

We now turn to whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity.

Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 388 (1973); *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949). One would think that this principle resolves the present case, since the statute criminalizes only offers to provide or requests to obtain contraband—child obscenity and child pornography involving actual children, both of which are proscribed, see 18 U. S. C. § 1466A(a), § 2252A(a)(5)(B) (2000 ed., Supp. V), and the proscription of which is constitutional, see *Free Speech Coalition*, 535 U. S., at 245–246, 256. The Eleventh Circuit, however, believed that the exclusion of First Amendment protection extended only to *commercial* offers to provide or receive contraband:

"Because [the statute] is not limited to commercial speech but extends also to non-commercial promotion, presentation, distribution, and solicitation, we must subject the content-based restriction of the PROTECT Act pandering provision to strict scrutiny . . . ." 444 F. 3d, at 1298.

This mistakes the rationale for the categorical exclusion. It is based not on the less privileged First Amendment status of commercial speech, see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980), but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection, see *Pittsburgh Press*, *supra*, at 387–389.[2] Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities. See, *e. g.*, ALI, Model Penal Code § 5.02(1) (1985) (solicitation to commit a crime); § 5.03(1)(a) (conspiracy to commit a crime). Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection. It would be an odd constitutional principle that permitted the government to prohibit offers to sell illegal drugs, but not offers to give them away for free.

To be sure, there remains an important distinction between a proposal to engage in illegal activity and the ab-

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[2] In *Pittsburgh Press*, the newspaper argued that we should afford that category of commercial speech which consists of help-wanted ads the same level of First Amendment protection as noncommercial speech, because of its important information-exchange function. We replied: "Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity . . . . We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." 413 U. S., at 388. The import of this response is that noncommercial proposals to engage in illegal activity have no greater protection than commercial proposals to do so.

stract advocacy of illegality. See *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–448 (1969) *(per curiam)*; see also *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 928–929 (1982). The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it. There is no doubt that this prohibition falls well within constitutional bounds. The constitutional defect we found in the pandering provision at issue in *Free Speech Coalition* was that it went *beyond* pandering to prohibit possession of material that could not otherwise be proscribed. 535 U. S., at 258.

In sum, we hold that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment. Since the Eleventh Circuit erroneously concluded otherwise, it applied strict scrutiny to §2252A(a)(3)(B), lodging three fatal objections. We address these objections because they could be recast as arguments that Congress has gone beyond the categorical exception.

The Eleventh Circuit believed it a constitutional difficulty that no child pornography need exist to trigger the statute. In its view, the fact that the statute could punish a "braggart, exaggerator, or outright liar" rendered it unconstitutional. 444 F. 3d, at 1298. That seems to us a strange constitutional calculus. Although we have held that the government can ban *both* fraudulent offers, see, *e. g.*, *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U. S. 600, 611–612 (2003), *and* offers to provide illegal products, the Eleventh Circuit would forbid the government from punishing *fraudulent offers to provide illegal products*. We see no logic in that position; if anything, such statements are doubly excluded from the First Amendment.

The Eleventh Circuit held that under *Brandenburg*, the "non-commercial, non-inciteful promotion of illegal child pornography" is protected, and §2252A(a)(3)(B) therefore overreaches by criminalizing the promotion of child pornography. 444 F. 3d, at 1298. As we have discussed earlier, however,

the term "promotes" does not refer to abstract advocacy, such as the statement "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography." It refers to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer.

The Eleventh Circuit found "particularly objectionable" the fact that the "reflects the belief" prong of the statute could ensnare a person who mistakenly believes that material is child pornography. *Ibid.* This objection has two conceptually distinct parts. First, the Eleventh Circuit thought that it would be unconstitutional to punish someone for mistakenly distributing virtual child pornography as real child pornography. We disagree. Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act are sorts of inchoate crimes—acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes—attempt and conspiracy, for example—impossibility of completing the crime because the facts were not as the defendant believed is not a defense. "All courts are in agreement that what is usually referred to as 'factual impossibility' is no defense to a charge of attempt." 2 W. LaFave, Substantive Criminal Law § 11.5(a)(2) (2d ed. 2003). (The author gives as an example "the intended sale of an illegal drug [that] actually involved a different substance." *Ibid.*) See also *United States* v. *Hamrick*, 43 F. 3d 877, 885 (CA4 1995) (en banc) (holding that impossibility is no defense to attempt and citing the holdings of four other Circuits); ALI, Model Penal Code § 5.01, Comment, p. 307 (in attempt prosecutions "the defendant's conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact").

Under this heading the Eleventh Circuit also thought that the statute could apply to someone who subjectively believes that an innocuous picture of a child is "lascivious." (Clause (v) of the definition of "sexually explicit conduct" is "lascivious exhibition of the genitals or pubic area of any person." §2256(2)(A) (2000 ed., Supp. V).) That is not so. The defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition. Where the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a "lascivious exhibition of the genitals," the statute has no application.

Williams and *amici* raise other objections, which demonstrate nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals. Williams argues, for example, that a person who offers nonpornographic photographs of young girls to a pedophile could be punished under the statute if the pedophile secretly expects that the pictures will contain child pornography. Brief for Respondent 19–20. That hypothetical does not implicate the statute, because the offeror does not hold the belief or intend the recipient to believe that the material is child pornography.

Amici contend that some advertisements for mainstream Hollywood movies that depict underage characters having sex violate the statute. Brief for Free Speech Coalition et al. as *Amici Curiae* 9–18. We think it implausible that a reputable distributor of Hollywood movies, such as Amazon.com, believes that one of these films contains *actual* children engaging in *actual or simulated* sex on camera; and even more implausible that Amazon.com would *intend* to make its customers believe such a thing. The average person understands that sex scenes in mainstream movies use nonchild actors, depict sexual activity in a way that would not rise to

the explicit level necessary under the statute, or, in most cases, both.

There was raised at oral argument the question whether turning child pornography over to the police might not count as "present[ing]" the material. See Tr. of Oral Arg. 9–11. An interpretation of "presents" that would include turning material over to the authorities would of course be self-defeating in a statute that looks to the prosecution of people who deal in child pornography. And it would effectively nullify §2252A(d), which provides an affirmative defense to the possession ban if a defendant promptly delivers child pornography to a law-enforcement agency. (The possession offense would simply be replaced by a pandering offense for delivering the material to law-enforcement officers.) In any event, the verb "present"—along with "distribute" and "advertise," as well as "give," "lend," "deliver," and "transfer"—was used in the definition of "promote" in *Ferber*. See 458 U. S., at 751 (quoting N. Y. Penal Law Ann. §263.15 (McKinney 1980)). Despite that inclusion, we had no difficulty concluding that the New York statute survived facial challenge. And in the period since *Ferber*, despite similar statutory definitions in other state statutes, see, *e. g.*, Alaska Stat. §11.61.125(d) (2006), Del. Code Ann., Tit. 11, §1109(5) (2007), we are aware of no prosecution for giving child pornography to the police. We can hardly say, therefore, that there is a "realistic danger" that §2252A(a)(3)(B) will deter such activity. *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 11 (1988) (citing *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940)).

It was also suggested at oral argument that the statute might cover documentary footage of atrocities being committed in foreign countries, such as soldiers raping young children. See Tr. of Oral Arg. 5–7. Perhaps so, if the material rises to the high level of explicitness that we have held is required. That sort of documentary footage could of course be the subject of an as-applied challenge. The courts

presumably would weigh the educational interest in the dissemination of information about the atrocities against the government's interest in preventing the distribution of materials that constitute "a permanent record" of the children's degradation whose dissemination increases "the harm to the child." *Ferber*, *supra*, at 759. Assuming that the constitutional balance would have to be struck in favor of the documentary, the existence of that exception would not establish that the statute is *substantially* overbroad. The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 800 (1984). In the vast majority of its applications, this statute raises no constitutional problems whatever.

Finally, the dissent accuses us of silently overruling our prior decisions in *Ferber* and *Free Speech Coalition*. See *post*, at 320 (opinion of SOUTER, J.). According to the dissent, Congress has made an end run around the First Amendment's protection of virtual child pornography by prohibiting proposals to transact in such images rather than prohibiting the images themselves. But an offer to provide or request to receive virtual child pornography is not prohibited by the statute. A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children. It is simply not true that this means "a protected category of expression [will] inevitably be suppressed," *post*, at 321. Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography. The dissent would require an exception from the statute's prohibition when, unbeknownst to one or both of the parties to the proposal, the completed transaction would not have been unlawful because it is (we have said) protected by the First Amendment. We fail to see what First Amendment interest would be served by drawing a

distinction between two defendants who attempt to acquire contraband, one of whom happens to be mistaken about the contraband nature of what he would acquire. Is Congress prohibited from punishing those who attempt to acquire what they believe to be national-security documents, but which are actually fakes? To ask is to answer. There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts.

III

As an alternative ground for facial invalidation, the Eleventh Circuit held that §2252A(a)(3)(B) is void for vagueness. Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill* v. *Colorado*, 530 U. S. 703, 732 (2000); see also *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972). Although ordinarily "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494–495, and nn. 6 and 7 (1982); see also *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 870–874 (1997). But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 794 (1989).

The Eleventh Circuit believed that the phrases "'in a manner that reflects the belief'" and "'in a manner . . . that

is intended to cause another to believe' " are "so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed." 444 F. 3d, at 1306. The court gave two examples. First, an e-mail claiming to contain photograph attachments and including a message that says " 'little Janie in the bath—hubba, hubba!' " *Ibid.* According to the Eleventh Circuit, given that the statute does not require the actual existence of illegal material, the Government would have "virtually unbounded discretion" to deem such a statement in violation of the " 'reflects the belief' " prong. *Ibid.* The court's second example was an e-mail entitled " 'Good pics of kids in bed' " with a photograph attachment of toddlers in pajamas asleep in their beds. *Ibid.* The court described three hypothetical senders: a proud grandparent, a "chronic forwarder of cute photos with racy tongue-in-cheek subject lines," and a child molester who seeks to trade the photographs for more graphic material. *Id.*, at 1306–1307. According to the Eleventh Circuit, because the "manner" in which the photographs are sent is the same in each case, and because the identity of the sender and the content of the photographs are irrelevant under the statute, all three senders could arguably be prosecuted for pandering. *Id.*, at 1307.

We think that neither of these hypotheticals, without further facts, would enable a reasonable juror to find, beyond a reasonable doubt, that the speaker believed and spoke in a manner that reflected the belief, or spoke in a manner intended to cause another to believe, that the pictures displayed actual children engaged in "sexually explicit conduct" as defined in the Act. The prosecutions would be thrown out at the threshold.

But the Eleventh Circuit's error is more fundamental than merely its selection of unproblematic hypotheticals. Its basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not

so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358, 363 (1970).

What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. See *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971); *Reno*, *supra*, at 870–871, and n. 35.

There is no such indeterminacy here. The statute requires that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe. Those are clear questions of fact. Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is "annoying" or "indecent." Similarly true or false is the determination whether a particular formulation reflects a belief that material or purported material is child pornography. To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. "But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411 (1950) (citing 2 J. Wigmore, Evidence §§ 244, 256 *et seq.* (3d ed. 1940)). And they similarly pass every day upon the reasonable import of a defendant's statements—whether, for example, they fairly convey a false rep-

resentation, see, *e. g.*, 18 U. S. C. § 1621 (criminalizing perjury), or a threat of physical injury, see, *e. g.*, § 115(a)(1) (criminalizing threats to assault federal officials). Thus, the Eleventh Circuit's contention that § 2252A(a)(3)(B) gives law-enforcement officials "virtually unfettered discretion" has no merit. No more here than in the case of laws against fraud, conspiracy, or solicitation.

* * *

Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet. This Court held unconstitutional Congress's previous attempt to meet this new threat, and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.

The judgment of the Eleventh Circuit is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring.

My conclusion that this statutory provision is not facially unconstitutional is buttressed by two interrelated considerations on which the Court finds it unnecessary to rely. First, I believe the result to be compelled by the principle that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper* v. *California*, 155 U. S. 648, 657 (1895); see also *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) (collecting cases).

Second, to the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters. It is abundantly clear from

the provision's legislative history that Congress' aim was to target materials advertised, promoted, presented, distributed, or solicited with a lascivious purpose—that is, with the intention of inciting sexual arousal. The provision was described throughout the deliberations in both Houses of Congress as the "pandering" or "pandering and solicitation" provision, despite the fact that the term "pandering" appears nowhere in the statute. See, *e. g.*, 149 Cong. Rec. 4227 (2003) ("[T]he bill criminalizes the pandering of child pornography, creating a new crime to respond to the Supreme Court's recent ruling [in *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234 (2002)]" (statement of Sen. Leahy, bill's cosponsor)); H. R. Conf. Rep. No. 108–66, p. 61 (2003) ("[The bill] includes a new pandering provision . . . that prohibits advertising, promoting, presenting, distributing, or soliciting . . . child pornography" (internal quotation marks omitted)); S. Rep. No. 108–2, p. 10 (2003) ("S. 151 creates three new offenses . . . . One prohibits the pandering or solicitation of child pornography"); *id.*, at 16 ("[T]he bill criminalizes the pandering of child pornography").

The Oxford English Dictionary defines the verb "pander," as "to minister to the gratification of (another's lust)," 11 Oxford English Dictionary 129 (2d ed. 1989). And Black's Law Dictionary provides, as relevant, this definition of "pandering": "The act or offense of selling or distributing textual or visual material (such as magazines or videotapes) openly advertised to appeal to the recipient's sexual interest." Black's Law Dictionary 1142 (8th ed. 2004) (hereinafter Black's).[1] Consistent with these dictionary definitions, our cases have explained that "pandering" is "'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest,'" *Ginzburg* v. *United States*, 383

[1] The first definition offered is: "The act or offense of recruiting a prostitute, finding a place of business for a prostitute, or soliciting customers for a prostitute." Black's 1142.

U. S. 463, 467, and n. 7 (1966) (quoting *Roth* v. *United States*, 354 U. S. 476, 495–496 (1957)).[2]

It was against this backdrop that Congress crafted the provision we uphold today. Both this context and the statements surrounding the provision's enactment convince me that in addition to the other limitations the Court properly concludes constrain the reach of the statute, the heightened scienter requirements described *ante*, at 295–296, contain an element of lasciviousness.

The dissent argues that the statute impermissibly undermines our First Amendment precedents insofar as it covers proposals to transact in constitutionally protected material. It is true that proof that a pornographic but not obscene representation did not depict real children would place that representation on the protected side of the line. But any constitutional concerns that might arise on that score are surely answered by the construction the Court gives the statute's operative provisions; that is, proposing a transaction in such material would not give rise to criminal liability under the statute unless the defendant actually believed, or intended to induce another to believe, that the material in question depicted real children.

Accordingly, when material which is protected—particularly if it possesses serious literary, artistic, political, or scientific value—is advertised, promoted, presented, distributed, or solicited for some lawful and nonlascivious purpose, such conduct is not captured by the statutory prohibition. Cf. *Miller* v. *California*, 413 U. S. 15, 24–25 (1973).

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[2] As I have explained elsewhere, *Ginzburg* has long since lost its force as law, see, *e. g.*, *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 249 (1990) (opinion concurring in part and dissenting in part) ("*Ginzburg* was decided before the Court extended First Amendment protection to commercial speech and cannot withstand our decision in *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976)"). Still, the case's explication of the meaning of "pandering" is instructive.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

Dealing in obscenity is penalized without violating the First Amendment, but as a general matter pornography lacks the harm to justify prohibiting it. If, however, a photograph (to take the kind of image in this case) shows an actual minor child as a pornographic subject, its transfer and even its possession may be made criminal. *New York* v. *Ferber*, 458 U. S. 747, 765–766 (1982); *Osborne* v. *Ohio*, 495 U. S. 103, 110–111 (1990). The exception to the general rule rests not on the content of the picture but on the need to foil the exploitation of child subjects, *Ferber*, 458 U. S., at 759–760, and the justification limits the exception: only pornographic photographs of actual children may be prohibited, see *id.*, at 763, 764; *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 249–251 (2002). Thus, just six years ago the Court struck down a statute outlawing particular material merely represented to be child pornography, but not necessarily depicting actual children. *Id.*, at 257–258.

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (Act), 117 Stat. 650, was enacted in the wake of *Free Speech Coalition*. The Act responds by avoiding any direct prohibition of transactions in child pornography[1] when no actual minors may be pictured; instead, it prohibits proposals for transactions in pornography when a defendant manifestly believes or would induce belief in a prospective party that the subject of an exchange or exhibition is or will be an actual child, not an impersonated, simulated or "virtual" one, or the subject of a

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[1] I use "child pornography" to mean any pornographic representation (such as a photograph, as in this case) that includes what appears to be a child subject. "True" or "real" child pornography refers to images made directly in pornographic settings with models who are minors; "fake" refers to simulations, components of lawful photos spliced together, or those made with adults looking young enough to be mistaken for minors.

composite created from lawful photos spliced together. The Act specifically prohibits three types of those proposals. It outlaws solicitation of child pornography, as well as two distinct kinds of offers: those "advertis[ing]" or "promot[ing]" prosecutable child pornography, which recommend the material with the implication that the speaker can make it available, and those "present[ing]" or "distribut[ing]" such child pornography, which make the material available to anyone who chooses to take it. 18 U. S. C. §2252A(a)(3)(B) (2000 ed., Supp. V).

The Court holds it is constitutional to prohibit these proposals, and up to a point I do not disagree. In particular, I accept the Court's explanation that Congress may criminalize proposals unrelated to any extant image. I part ways from the Court, however, on the regulation of proposals made with regard to specific, existing representations. Under the new law, the elements of the pandering offense are the same, whether or not the images are of real children. As to those that do not show real children, of course, a transaction in the material could not be prosecuted consistently with the First Amendment, and I believe that maintaining the First Amendment protection of expression we have previously held to cover fake child pornography requires a limit to the law's criminalization of pandering proposals. In failing to confront the tension between ostensibly protecting the material pandered while approving prosecution of the pandering of that same material, and in allowing the new pandering prohibition to suppress otherwise protected speech, the Court undermines *Ferber* and *Free Speech Coalition* in both reasoning and result. This is the significant element of today's holding, and I respectfully dissent from it.

I

The easy case for applying the Act would be a proposal to obtain or supply child pornography supposedly showing a real child, when the solicitation or offer is unrelated to any

image (that is, when the existence of pornographic "material" was merely "purported"). See *ante*, at 293 ("The statute does not require the actual existence of child pornography"). A proposal speaking of a pornographic photograph of a child is (absent any disclaimer or qualification) understood to mean a photo of an actual child; the reasonable assumption is that people desiring child pornography are not looking for fake child pornography, so that those who speak about it mean the real thing. Hence, someone who seeks to obtain child pornography (having no specific artifact in mind) "solicits" an unlawful transfer of contraband. 18 U. S. C. §2252A(a)(3)(B). On the other side of that sort of proposed transaction, someone with nothing to supply or having only nonexpressive matter who purports to present, distribute, advertise, or promote child pornography also proposes an illegal transaction. In both cases, the activity would amount to an offer to traffic in child pornography that may be suppressed, and the First Amendment does not categorically protect offers to engage in illegal transactions. To the extent the speaker intended to mislead others, a conviction would also square with the unprotected status of fraud, see *ante*, at 299; and even a nonfraudulent speaker who mistakenly believed he could obtain the forbidden contraband to transfer to anyone who accepted an offer could be validly convicted consistent with the general rule of criminal law, that attempting to commit a crime is punishable even though the completed crime might (or would) turn out to be impossible in fact, see *ante*, at 300.

The easy cases for constitutional application of the Act are over, however, when one gets to proposals for transactions related to extant pornographic objects, like photos in a dealer's inventory, for example. These will in fact be the common cases, as the legislative findings attest. See §§501(1)–(15), 117 Stat. 676–678. Congress did not pass the Act to catch unsuccessful solicitors or fraudulent offerors with no photos to sell; rather, it feared that "[t]he mere prospect that

the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution . . . . This threatens to render child pornography laws that protect real children unenforceable." *Id.*, § 501(13).

A person who "knowingly" proposes a transaction in an extant image incorporates into the proposal an understanding that the subject of the proposal is or includes that image. Cf. *ante*, at 300 ("['Promotes'] refers to the recommendation of a particular piece of purported child pornography . . . "). Congress understood that underlying most proposals there will be an image that shows a child, and the proposal referring to an actual child's picture will thus amount to a proposal to commit an independent crime such as a transfer of child pornography, see 18 U. S. C. §§ 2252A(a)(1), (2). But even when actual pictures thus occasion proposals, the Act requires no finding that an actual child be shown in the pornographic setting in order to prove a violation. And the fair assumption (apparently made by Congress) is that in some instances, the child pornography in question will be fake, with the picture showing only a simulation of a child, for example, or a very young-looking adult convincingly passed off as a child; in those cases the proposal is for a transaction that could not itself be made criminal, because the absence of a child model means that the image is constitutionally protected. See *Free Speech Coalition*, 535 U. S., at 246. But under the Act, that is irrelevant. What matters is not the inclusion of an actual child in the image, or the validity of forbidding the transaction proposed; what counts is simply the manifest belief or intent to cause a belief that a true minor is shown in the pornographic depiction referred to.

The tension with existing constitutional law is obvious. *Free Speech Coalition* reaffirmed that nonobscene virtual pornographic images are protected, because they fail to trigger the concern for child safety that disentitles child pornog-

raphy to First Amendment protection. See *id.*, at 249–251. The case thus held that pictures without real minors (but only simulations, or young-looking adults) may not be the subject of a nonobscenity pornography crime, *id.*, at 246, 251, and it has reasonably been taken to mean that transactions in pornographic pictures featuring children may not be punished without proof of real children, see, *e. g.*, *United States* v. *Salcido*, 506 F. 3d 729, 733 (CA9 2007) *(per curiam)* ("In *[Free Speech Coalition]*, the Supreme Court held that possession of 'virtual' child pornography cannot constitute a criminal offense. . . . As a result, the government has the burden of proving beyond a reasonable doubt that the images were of actual children, not computer-generated images"); cf. *Free Speech Coalition*, *supra*, at 255 ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful"). The Act, however, punishes proposals regarding images when the inclusion of actual children is not established by the prosecution, as well as images that show no real children at all; and this, despite the fact that, under *Free Speech Coalition*, the first proposed transfer could not be punished without the very proof the Act is meant to dispense with, and the second could not be made criminal at all.

II

What justification can there be for making independent crimes of proposals to engage in transactions that may include protected materials? The Court gives three answers, none of which comes to grips with the difficulty raised by the question. The first, *ante*, at 303, says it is simply wrong to say that the Act makes it criminal to propose a lawful transaction, since an element of the forbidden proposal must express a belief or inducement to believe that the subject of the proposed transaction shows actual children. But this does not go to the point. The objection is not that the Act criminalizes a proposal for a transaction described as being

in virtual (that is, protected) child pornography. The point is that some proposals made criminal, because they express a belief that they refer to real child pornography, will relate to extant material that does not, or cannot be, demonstrated to show real children and so may not be prohibited. When a proposal covers existing photographs, the Act does not require that the requisite belief (manifested or encouraged) in the reality of the subjects be a correct belief. Prohibited proposals may relate to transactions in lawful, as well as unlawful, pornography.

Much the same may be said about the Court's second answer, that a proposal to commit a crime enjoys no speech protection. *Ante*, at 297. For the reason just given, that answer does not face up to the source of the difficulty: the action actually contemplated in the proposal, the transfer of the particular image, is not criminal if it turns out that an actual child is not shown in the photograph. If *Ferber* and *Free Speech Coalition* are good law, the facts sufficient for conviction under the Act do not suffice to show that the image (perhaps merely simulated), and thus a transfer of that image, are outside the bounds of constitutional protection. For this reason, it is not enough just to say that the First Amendment does not protect proposals to commit crimes. For that rule rests on the assumption that the proposal is actually to commit a crime, not to do an act that may turn out to be no crime at all. Why should the general rule of unprotected criminal proposals cover a case like the proposal to transfer what may turn out to be fake child pornography?

The Court's third answer analogizes the proposal to an attempt to commit a crime, and relies on the rule of criminal law that an attempt is criminal even when some impediment makes it impossible to complete the criminal act (the possible impediment here being the advanced age, say, or simulated character of the child figure). See *ante*, at 300. Although the actual transfer the speaker has in mind may not turn out to be criminal, the argument goes, the transfer in-

tended by the speaker is criminal, because the speaker believes[2] that the contemplated transfer will be of real child pornography, and transfer of real child pornography is criminal. The fact that the circumstances are not as he believes them to be, because the material does not depict actual minors, is no defense to his attempt to engage in an unlawful transaction.

But invoking attempt doctrine to dispense with *Free Speech Coalition*'s real-child requirement in the circumstances of this case is incoherent with the Act, and it fails to fit the paradigm of factual impossibility or qualify for an extended version of that rule. The incoherence of the Court's answer with the scheme of the Act appears from § 2252A(b)(1) (2000 ed., Supp. V), which criminalizes attempting or conspiring to violate the Act's substantive prohibitions, including the pandering provision of § 2252A(a)(3)(B). Treating pandering itself as a species of attempt would thus mean that there is a statutory, inchoate offense of attempting to attempt to commit a substantive child pornography crime. A metaphysician could imagine a system like this, but the

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[2] I leave largely aside the case of fraudulent proposals passing off virtual pornography as the real thing. The fact that fraud is a separate category of speech which independently lacks First Amendment protection changes the analysis with regard to such proposals, although it does not necessarily dictate the conclusion. The Court has placed limits on the policing of fraud when it cuts too far into other protected speech. See, *e. g.*, *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 787–795 (1988) (invalidating professional fundraiser regulation under strict scrutiny). Also relevant to the analysis would be that the Act is hardly a consumer-protection statute; Congress seems to have cared little for the interests of would-be child pornography purchasers, and the penalties for violating the Act are quite onerous compared with other consumer-protection laws. See Brief for American Booksellers Foundation for Free Expression et al. as *Amici Curiae* 17, and n. 8 (identifying laws punishing fraud as a misdemeanor or with civil penalties). A court could legitimately question whether the unprotected status of fraud enables the Government to punish the transfer of otherwise protected speech with penalties so apparently disproportionate to the harm that fraud is understood to cause.

universe of inchoate crimes is not expandable indefinitely under the actual principles of criminal law, let alone when First Amendment protection is threatened. See 2 W. LaFave, Substantive Criminal Law § 11.2(a), p. 208 (2d ed. 2003) ("[W]here a certain crime is actually defined in terms of either doing or attempting a certain crime, then the argument that there is no crime of attempting this attempt is persuasive").

The more serious failure of the attempt analogy, however, is its unjustifiable extension of the classic factual frustration rule, under which the action specifically intended would be a criminal act if completed. The intending killer who mistakenly grabs the pistol loaded with blanks would have committed homicide if bullets had been in the gun; it was only the impossibility of completing the very intended act of shooting bullets that prevented the completion of the crime. This is not so, however, in the proposed transaction in an identified pornographic image without the showing of a real child; no matter what the parties believe, and no matter how exactly a defendant's actions conform to his intended course of conduct in completing the transaction he has in mind, if there turns out to be reasonable doubt that a real child was used to make the photos, or none was, there could be, respectively, no conviction and no crime. Thus, in the classic impossibility example, there is attempt liability when the course of conduct intended cannot be completed owing to some fact which the defendant was mistaken about, and which precludes completing the intended physical acts. But on the Court's reasoning there would be attempt liability even when the contemplated acts had been completed exactly as intended, but no crime had been committed. Why should attempt liability be recognized here (thus making way for "proposal" liability, under the Court's analogy)?

The Court's first response is to demur, with its example of the drug dealer who sells something else. *Ante*, at 300. (A package of baking powder, not powder cocaine, would be an

example.) No one doubts the dealer may validly be convicted of an attempted drug sale even if he did not know it was baking powder he was selling. Yet selling baking powder is no more criminal than selling virtual child pornography.

This response does not suffice, however, because it overlooks a difference between the lawfulness of selling baking powder and the lawful character of virtual child pornography. Powder sales are lawful but not constitutionally privileged. Any justification within the bounds of rationality would suffice for limiting baking powder transactions, just as it would for regulating the discharge of blanks from a pistol. Virtual pornography, however, has been held to fall within the First Amendment speech privilege, and thus is affirmatively protected, not merely allowed as a matter of course. The question stands: why should a proposal that may turn out to cover privileged expression be subject to standard attempt liability?

The Court's next response deals with the privileged character of the underlying material. It gives another example of attempt that presumably could be made criminal, in the case of the mistaken spy, who passes national security documents thinking they are classified and secret, when in fact they have been declassified and made subject to public inspection. *Ante*, at 303–304. Publishing unclassified documents is subject to the First Amendment privilege and can claim a value that fake child pornography cannot. The Court assumes that the document publication may be punished as an attempt to violate state-secret restrictions (and I assume so too); then why not attempt proposals based on a mistaken belief that the underlying material is real child pornography? As the Court looks at it, the deterrent value that justifies prosecuting the mistaken spy (like the mistaken drug dealer and the intending killer) would presumably validate prosecuting those who make proposals about fake child pornography. But it would not, for there are significant dif-

ferences between the cases of security documents and pornography without real children.

Where Government documents, blank cartridges, and baking powder are involved, deterrence can be promoted without compromising any other important policy, which is not true of criminalizing mistaken child pornography proposals. There are three dispositive differences. As for the first, if the law can criminalize proposals for transactions in fake as well as true child pornography as if they were like attempts to sell cocaine that turned out to be baking powder, constitutional law will lose something sufficiently important to have made it into multiple holdings of this Court, and that is the line between child pornography that may be suppressed and fake child pornography that falls within First Amendment protection. No one can seriously assume that after today's decision the Government will go on prosecuting defendants for selling child pornography (requiring a showing that a real child is pictured, under *Free Speech Coalition*, 535 U. S., at 249–251); it will prosecute for merely proposing a pornography transaction manifesting or inducing the belief that a photo is real child pornography, free of any need to demonstrate that any extant underlying photo does show a real child. If the Act can be enforced, it will function just as it was meant to do, by merging the whole subject of child pornography into the offense of proposing a transaction, dispensing with the real-child element in the underlying subject. And eliminating the need to prove a real child will be a loss of some consequence. This is so not because there will possibly be less pornography available owing to the greater ease of prosecuting, but simply because there must be a line between what the Government may suppress and what it may not, and a segment of that line will be gone. This Court went to great pains to draw it in *Ferber* and *Free Speech Coalition;* it was worth drawing and it is worth respecting now in facing the attempt to end-run that line through the provisions of the Act.

The second reason for treating child pornography differently follows from the first. If the deluded drug dealer is held liable for an attempt crime there is no risk of eliminating baking powder from trade in lawful commodities. Likewise, if the mistaken spy is convicted of attempting to disclose classified national security documents there will be no worry that lawful speech will be suppressed as a consequence; any unclassified documents in question can be quoted in the newspaper, other unclassified documents will circulate, and analysts of politics and foreign policy will be able to rely on them. But if the Act can effectively eliminate the real-child requirement when a proposal relates to extant material, a class of protected speech will disappear. True, what will be lost is short on merit, but intrinsic value is not the reason for protecting unpopular expression.

Finally, if the Act stands when applied to identifiable, extant pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally, and when a case as well considered and as recently decided as *Free Speech Coalition* is put aside (after a mere six years) there ought to be a very good reason. Another pair of First Amendment cases come to mind, compare *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940), with *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943). In *Barnette*, the Court set out the reason for its abrupt turn in overruling *Gobitis* after three years, 319 U. S., at 635–642, but here nothing is explained. Attempts with baking powder and unclassified documents can be punished without damage to confidence in precedent; suppressing protected pornography cannot be.

These differences should be dispositive. Eliminating the line between protected and unprotected speech, guaranteeing the suppression of a category of expression previously protected, and reducing recent and carefully considered First Amendment precedents to empty shells are heavy prices, not to be paid without a substantial offset, which is

missing from this case. Hence, my answer that there is no justification for saving the Act's attempt to get around our holdings. We should hold that a transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a completed series of intended acts that simply do not add up to a crime, owing to the privileged character of the material the parties were in fact about to deal in.

The upshot is that there ought to be no absolute rule on the relationship between attempt liability and a frustrating mistake. Not all attempts frustrated by mistake should be punishable, and not all mistaken assumptions that expressive material is unprotected should bar liability for attempts to commit a crime. The legitimacy of attempt liability should turn on its consequences for protected expression and the law that protects it. When, as here, a protected category of expression would inevitably be suppressed and its First Amendment safeguard left pointless, the Government has the burden to justify this damage to free speech.

III

Untethering the power to suppress proposals about extant pornography from any assessment of the likely effects the proposals might have has an unsettling significance well beyond the subject of child pornography. For the Court is going against the grain of pervasive First Amendment doctrine that tolerates speech restriction not on mere general tendencies of expression, or the private understandings of speakers or listeners, but only after a critical assessment of practical consequences. Thus, one of the milestones of American political liberty is *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*, which is seen as the culmination of a half century's development that began with Justice Holmes's dissent in *Abrams* v. *United States*, 250 U. S. 616 (1919). In place of the rule that dominated the First World War sedition and espionage cases, allowing suppression of speech for

its tendency and the intent behind it, see *Schenck* v. *United States*, 249 U. S. 47, 52 (1919), *Brandenburg* insisted that

> "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U. S., at 447.

See also G. Stone, Perilous Times: Free Speech in Wartime 522 (2004) ("[E]xactly fifty years after *Schenck*, the Supreme Court finally and unambiguously embraced the Holmes-Brandeis version of clear and present danger").

Brandenburg unmistakably insists that any limit on speech be grounded in a realistic, factual assessment of harm. This is a far cry from the Act before us now, which rests criminal prosecution for proposing transactions in expressive material on nothing more than a speaker's statement about the material itself, a statement that may disclose no more than his own belief about the subjects represented or his desire to foster belief in another. This should weigh heavily in the overbreadth balance, because "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*, 535 U. S., at 253. See also *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 579 (1995) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis").

IV

I said that I would not pay the price enacted by the Act without a substantial justification, which I am at a loss to find here. I have to assume that the Court sees some grounding for the Act that I do not, however, and I suppose the holding can only be explained as an uncritical acceptance of a claim made both to Congress and to this Court. In each forum the Government argued that a jury's appreciation of the mere possibility of simulated or virtual child pornography will prevent convictions for the real thing, by inevitably raising reasonable doubt about whether actual children are shown. The Government voices the fear that skeptical jurors will place traffic in child pornography beyond effective prosecution unless it can find some way to avoid the *Ferber* limitation, skirt *Free Speech Coalition*, and allow prosecution whether pornography shows actual children or not.

The claim needs to be taken with a grain of salt. There has never been a time when some such concern could not be raised. Long before the Act was passed, for example, pornographic photos could be taken of models one day into adulthood, and yet there is no indication that prosecution has ever been crippled by the need to prove young-looking models were underage.

Still, if I were convinced there was a real reason for the Government's fear stemming from computer simulation, I would be willing to reexamine *Ferber*. Conditions can change, and if today's technology left no other effective way to stop professional and amateur pornographers from exploiting children there would be a fair claim that some degree of expressive protection had to yield to protect the children.

But the Government does not get a free pass whenever it claims a worthy objective for curtailing speech, and I have further doubts about the need claimed here. Although Congress found that child pornography defendants "almost uni-

versally rais[e]" the defense that the alleged child pornography could be simulated or virtual, § 501(10), 117 Stat. 677, neither Congress nor this Court has been given the citation to a single case in which a defendant's acquittal is reasonably attributable to that defense.[3] See Brief for Free Speech Co-

[3] During hearings prior to passage of the Act, the Department of Justice presented Congress with three examples of prosecutions purportedly frustrated by a virtual-child defense. See Hearing on H. R. 1104 and H. R. 1161 before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 108th Cong., 1st Sess., 9 (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General). In *United States* v. *Bunnell*, No. CRIM.02–13–B–S, 2002 WL 927765 (D Me., May 1, 2002), the court allowed the defendant to withdraw his guilty plea after the *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234 (2002), decision. The defendant did not, however, present a virtual-child defense to a jury, nor was he acquitted; indeed the court rejected his motion to dismiss, see Criminal Docket for Case No. 1:02CR00013 (D Me.). (The docket report also indicates that the defendant's trial was then continued during his prosecution in state court, with the Government moving to dismiss upon receipt of a judgment and commitment from the state court. See *ibid.*)

In *United States* v. *Reilly*, No. 01 CR. 1114(RPP), 2002 WL 31307170 (SDNY, Oct. 15, 2002), the court also allowed a defendant to withdraw a guilty plea after the issuance of *Free Speech Coalition*, because his plea was founded on a belief that the Government need not prove the involvement of actual children in the material at issue. (After the time of the congressional hearings, the court dismissed the child pornography charges upon the Government's motion, and the defendant was convicted on multiple counts of transportation of obscene material under 18 U. S. C. § 1462. See Criminal Docket for Case No. 1:01CR01114 (SDNY).)

In *United States* v. *Sims*, 220 F. Supp. 2d 1222 (NM 2002), the defendant was convicted after a jury trial at which the Government contended, and the court agreed, that it did not bear the burden of proving that the images at issue depicted actual minors. The *Free Speech Coalition* decision came down soon afterward, and the defendant filed a post-trial motion for acquittal. The trial court held that the Government did bear the burden of proof and had met it with regard to one count but not with regard to another, upon which it had presented no evidence of the use of actual children. The trial court acquitted the defendant on the latter count, observing that "[t]he government could have taken a more cautionary approach and presented evidence to prove the use of actual children, but it

alition et al. as *Amici Curiae* 21–23; Brief for National Law Center for Children and Families et al. as *Amici Curiae* 10–13. The Government thus seems to be selling itself short; it appears to be highly successful in convicting child pornographers, the overwhelming majority of whom plead guilty rather than try their luck before a jury with a virtual-child defense.[4] And little seems to have changed since the time

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made the strategic decision not to do so." 220 F. Supp. 2d, at 1227. The Government did not seek review of this ruling on appeal.

In short, all of the cases presented to Congress involved the short-term transition on the burden-of-proof issue occasioned by the *Free Speech Coalition* decision; none of them involved a jury or judge's acquittal of a defendant on the basis of a virtual-child defense.

Nor do the Government's *amici* identify other successful employments of a virtual-child defense. One *amicus* says that *Free Speech Coalition* spawned serious prosecutorial problems, but the only example it gives of an acquittal is a defendant's partial acquittal in an Ohio bench trial under an Ohio statute, where the judge convicted the defendant of counts involving images for which the prosecution presented expert testimony of the minor's identity and acquitted him of counts for which it did not. See Brief for National Law Center for Children and Families et al. as *Amici Curiae* 11 (citing *State* v. *Tooley*, No. 2004–P–0064, 2005–Ohio–6709, 2005 WL 3476649 (App., Dec. 16, 2005)). The State apparently did not cross-appeal the acquittals, but in considering defendant's appeal of his convictions, the Supreme Court of Ohio held that his hearsay objection to the Government's expert was irrelevant, because "*[Free Speech Coalition]* did not impose a heightened evidentiary burden on the state to specifically identify the child or to use expert testimony to prove that the image contains a real child." 114 Ohio St. 3d 366, 381, 2007–Ohio–3698, 872 N. E. 2d 894, 908 (2007). Rather, "[t]he fact-finder in this case, the trial judge, was capable of reviewing the evidence to determine whether the state met its burden of showing that the images depicted real children." *Id.*, at 382, 872 N. E. 2d, at 909. The case hardly bespeaks a prosecutorial crisis.

[4] According to the U. S. Department of Justice Bureau of Justice Statistics, in the 1,209 federal child pornography cases concluded in 2006, 95.1% of defendants were convicted. Bureau of Justice Statistics Bulletin, Federal Prosecution of Child Sex Exploitation Offenders, 2006, p. 6 (Dec. 2007), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/fpcseo06.pdf (as visited May 8, 2008, and available in Clerk of Court's case file). By comparison, of the 161 child pornography cases concluded in 1996, 96.9% of

of *Free Speech Coalition*, when the Court rejected an assertion of the same interest. See 535 U. S., at 254–255 ("[T]he Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. . . . The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down"); *id.*, at 259 (THOMAS, J., concurring in judgment) ("At this time . . . the Government asserts only that defendants *raise* such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a 'computer-generated images' defense").

Without some convincing evidence to the contrary, experience tells us to have faith in the capacity of the jury system, which I would have expected to operate in much the follow-

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defendants were convicted. *Ibid.* Of the 2006 cases, 92.2% ended with a plea. *Ibid.* The 4.9% of defendants not convicted in 2006 was made up of 4.5% whose charges were dismissed, and only 0.4% who were not convicted at trial. *Ibid.*

Nor do the statistics suggest a crisis in the ability to prosecute. In 2,376 child pornography matters concluded by U. S. Attorneys in 2006, 58.5% of them were prosecuted, while 37.8% were declined for prosecution, and 3.7% were disposed by a U. S. magistrate judge. *Id.*, at 2. By comparison, the prosecution rate for all matters concluded by U. S. Attorneys in 2006 was 59%. *Ibid.* Nor did weak evidence make up a disproportionate part of declined prosecutions. Of the child pornography cases declined for prosecution, 24.3% presented problems of weak or inadmissible evidence; 22.7% were declined for lack of evidence of criminal intent; and in 18.7% the suspects were prosecuted on other charges. *Id.*, at 3. In comparison, weak or inadmissible evidence accounted for 53% of declined prosecutions for sex abuse and 20.4% for sex transportation, both sexual exploitation crimes which do not easily admit of a virtual-child defense. *Ibid.*

None of these data, to be sure, isolates the experience between *Free Speech Coalition* and the current Act, or breaks down the post-Act numbers by reference to prosecution under the Act. If the generality of the

ing way, if the Act were not on the books. If the Government sought to prosecute proposals about extant images as attempts, it would seek to carry its burden of showing that real children were depicted in the image subject to the proposal simply by introducing the image into evidence; if the figures in the picture looked like real children, the Government would have made its prima facie demonstration on that element.[5] The defense might well offer expert testimony to the effect that technology can produce convincing simulations, but if this was the extent of the testimony that came in, the cross-examination would ask whether the witness could say that this particular, seemingly authentic representation was merely simulated. If the witness could say that (or said so on direct), and survived further questioning about the basis for the opinion and its truth, acquittal would have been proper; the defendant would have raised reasonable doubt about whether a child had been victimized (the same standard that would govern if the defendant were on trial for abusing a child personally). But if the defense had no specific evidence that the particular image failed to show actual children, I am skeptical that a jury would have been likely to entertain reasonable doubt that the image showed a real child.

Perhaps I am wrong, but without some demonstration that juries have been rendering exploitation of children unpunishable, there is no excuse for cutting back on the First Amendment and no alternative to finding overbreadth in this Act. I would hold it unconstitutional on the authority of *Ferber* and *Free Speech Coalition*.

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statistics is a problem, however, it is for the Government, which makes the necessity claim.

[5]The Courts of Appeals to consider the issue have declined to require expert evidence to prove the authenticity of images, generally finding the images themselves sufficient to prove the depiction of actual minors. See, *e. g.*, *United States* v. *Salcido*, 506 F. 3d 729, 733–734 (CA9 2007) *(per curiam)* (collecting cases).

Syllabus

DEPARTMENT OF REVENUE OF KENTUCKY ET AL. *v.* DAVIS ET UX.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 06–666. Argued November 5, 2007—Decided May 19, 2008

Kentucky exempts from state income taxes interest on bonds issued by it or its political subdivisions but not on bonds issued by other States and their subdivisions. After paying state income tax on out-of-state municipal bonds, respondents sued petitioners (hereinafter Kentucky) for a refund, claiming that Kentucky's differential tax impermissibly discriminated against interstate commerce. The trial court ruled for Kentucky, relying in part on a "market-participation" exception to the dormant Commerce Clause limit on state regulation. The State Court of Appeals reversed, finding that Kentucky's scheme ran afoul of the Commerce Clause.

Held: The judgment is reversed, and the case is remanded.

197 S. W. 3d 557, reversed and remanded.

JUSTICE SOUTER delivered the opinion of the Court, except as to Part III–B, concluding that Kentucky's differential tax scheme does not offend the Commerce Clause. Pp. 337–343, 349–357.

(a) Modern dormant Commerce Clause law is driven by concern about "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 273–274—but that concern is limited by federalism favoring a degree of local autonomy. Under the resulting analysis, a discriminatory law is "virtually *per se* invalid." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99. An exception covers States that go beyond regulation and themselves "participat[e] in the market" to "exercis[e] the right to favor [their] own citizens over others," *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 810, reflecting a "basic distinction . . . between States as market participants and States as market regulators," *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 436. Last Term, in a case decided independently of the market participant exception, this Court upheld an ordinance requiring trash haulers to deliver solid waste to a public authority's processing plant, finding that it addressed what was "'both typically and traditionally a local government function,'" and did "not discriminate against interstate commerce for purposes of the dormant Commerce Clause," *United Haulers Assn., Inc.*

Syllabus

v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 344, 342. Pp. 337–340.

(b) *United Haulers* provides a firm basis for reversal here. The logic that a government function is not susceptible to standard dormant Commerce Clause scrutiny because it is likely motivated by legitimate objectives distinct from simple economic protectionism applies with even greater force to laws favoring a State's municipal bonds, since issuing debt securities to pay for public projects is a quintessentially public function, with a venerable history. Bond proceeds are a way to shoulder the cardinal civic responsibilities listed in *United Haulers:* protecting citizens' health, safety, and welfare. And *United Haulers*' apprehension about "unprecedented . . . interference" with a traditional government function is warranted here, where respondents would have this Court invalidate a century-old taxing practice presently employed by 41 States and supported by all. In fact, emphasizing an enterprise's public character is just one step in addressing the fundamental element of dormant Commerce Clause jurisprudence that "any notion of discrimination assumes a comparison of substantially similar entities," 550 U. S., at 342. Viewed through the lens of *Bonaparte* v. *Tax Court*, 104 U. S. 592, there is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being "substantially similar" to other bond issuers in the market. Pp. 341–343.

(c) A look at the specific markets in which the exemption's effects are felt confirms that no traditionally forbidden discrimination is underway and points to the tax policy's distinctive character. In both the interstate market as most broadly conceived—issuers and holders of all fixed-income securities—and the more specialized market—commerce solely in federally tax-exempt municipal bonds, often conducted through interstate municipal bond funds—nearly every taxing State believes its public interests are served by the same tax-and-exemption feature which is supported in this Court by every State. These facts suggest that no State perceives any local advantage or disadvantage beyond the permissible ones open to a government and to those who deal with that government when it enters the market. An equally significant perception emerges from examining the market for municipal bonds within the issuing State, a large proportion of which market is managed by one or more single-state funds. An important feature of such markets is that intrastate funds absorb securities issued by smaller or lesser known municipalities that interstate markets tend to ignore. Many single-state funds would likely disappear if the current differential tax schemes were upset, and there is no suggestion that the interstate markets would welcome the weaker municipal issues that would lose their local market homes after a Davis victory. Financing for long-term municipal

Syllabus

improvements would thus change radically if the differential tax feature disappeared. The fact that the differential tax scheme is critical to the operation of an identifiable segment of the current municipal financial market demonstrates that the States' unanimous desire to preserve the scheme is a far cry from the private protectionism that has driven the dormant Commerce Clause's development. Pp. 349–353.

(d) The Court generally applies the rule in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142, that even nondiscriminatory burdens on commerce may be struck down on a showing that they clearly outweigh the benefits of a state or local practice. But the current record and scholarly material show that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden in this particular case. Pp. 353–356.

SOUTER, J., announced the judgment of the Court and delivered the opinion of the Court, except as to Part III–B. STEVENS and BREYER, JJ., joined that opinion in full; ROBERTS, C. J., and GINSBURG, J., joined all but Part III–B; and SCALIA, J., joined all but Parts III–B and IV. STEVENS, J., filed a concurring opinion, *post*, p. 357. ROBERTS, C. J., *post*, p. 359, and SCALIA, J., *post*, p. 359, filed opinions concurring in part. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 361. KENNEDY, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 362. ALITO, J., filed a dissenting opinion, *post*, p. 376.

C. Christopher Trower argued the cause for petitioners. With him on the briefs were *Gwen R. Pinson* and *Douglas M. Dowell.*

G. Eric Brunstad, Jr., argued the cause for respondents. With him on the brief were *Rheba Rutkowski, M. Stephen Dampier, Charles R. Watkins, John R. Wylie, David J. Guin, Tammy McClendon Stokes, Irvin D. Foley, Anthony G. Raluy, M. Scott Barrett, Charles S. Zimmerman, Hart L. Robinovitch, Michael C. Moran, Arthur T. Susman, Matthew T. Hurst*, and *Matthew T. Heffner.*[*]

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[*]Briefs of *amici curiae* urging reversal were filed for the State of North Carolina et al. by *Roy Cooper*, Attorney General of North Carolina, *Christopher G. Browning, Jr.*, *Kay Linn Miller Hobart*, and *Gregory P. Roney*, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Talis J. Colberg* of Alaska, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *Edmund G. Brown, Jr.*, of California, *John*

JUSTICE SOUTER delivered the opinion of the Court, except as to Part III–B.†

For the better part of two centuries States and their political subdivisions have issued bonds for public purposes, and for nearly half that time some States have exempted interest

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W. Suthers of Colorado, *Richard Blumenthal* of Connecticut, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Paul Morrison* of Kansas, *Charles C. Foti, Jr.*, of Louisiana, *G. Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Anne Milgram* of New Jersey, *Gary King* of New Mexico, *Andrew M. Cuomo* of New York, *Wayne Stenehjem* of North Dakota, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas J. Corbett, Jr.*, of Pennsylvania, *Patrick Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Bob McDonnell* of Virginia, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Patrick J. Crank* of Wyoming; for the Churchill Tax-Free Fund of Kentucky et al. by *Michael F. Smith*, *Philip J. Kessler*, and *Dennis K. Egan*; for Dupree Mutual Funds by *P. Anthony Sammons*; for the Government Finance Officers Association et al. by *Richard Ruda*; for the National Association of State Treasurers by *Robert A. Long*, *Theodore P. Metzler*, *Richard L. Sigal*, and *Richard A. Cordray*; for Nuveen Investments, Inc., by *Barry Sullivan* and *J. Kevin McCall*; and for the Securities Industry and Financial Markets Association by *Carter G. Phillips*, *Richard D. Bernstein*, *A. Robert Pietrzak*, *Daniel A. McLaughlin*, *Kevin M. Carroll*, and *Leslie M. Norwood*.

Briefs of *amici curiae* urging affirmance were filed for the Tax Foundation by *Brian E. Bailey*; and for Alan D. Viard et al. by *Lucinda O. McConathy*.

Briefs of *amici curiae* were filed for the Multistate Tax Commission by *Sheldon H. Laskin*; and for the National Federation of Municipal Analysts by *Leonard Weiser-Varon*, *William C. Brashares*, *Maxwell D. Solet*, and *Noah C. Shaw*.

†JUSTICE GINSBURG joins all but Part III–B of this opinion.

on their own bonds from their state income taxes, which are imposed on bond interest from other States. The question here is whether Kentucky's version of this differential tax scheme offends the Commerce Clause. We hold that it does not.

I

A

Like most other States, the Commonwealth of Kentucky taxes its residents' income. See Ky. Rev. Stat. Ann. § 141.020(1) (West 2006). The tax is assessed on "net income," see *ibid.*, calculated by reference to "gross income" as defined by the Internal Revenue Code, see §§ 141.010(9)–(11) (West Supp. 2007),[1] which excludes "interest on any State or local bond" ("municipal bond," for short[2]), 26 U. S. C. § 103(a).

[1] Specifically, Kentucky defines "net income" for noncorporate taxpayers as "adjusted gross income," minus certain deductions. See Ky. Rev. Stat. Ann. § 141.010(11). "Adjusted gross income," in turn, is defined as "gross income" minus other deductions spelled out in the Internal Revenue Code and elsewhere in the Kentucky statutes. See § 141.010(10). Finally, "gross income" has the same meaning set out in § 61 of the Internal Revenue Code. See § 141.010(9); see also 26 U. S. C. § 61.

[2] "Municipal bond" is commonly defined as a "debt obligation of a state or local government entity." J. Downes & J. Goodman, Dictionary of Finance and Investment Terms 439 (7th ed. 2006). We use that definition here; our references to "municipal bonds" thus include bonds issued by States and their political subdivisions.

An argument raised by one of the Davises' *amici* focuses on so-called "private-activity," "industrial-revenue," or "conduit" bonds, a subset of municipal bonds used to finance projects by private entities. These bonds are often (but not always) exempt under the Kentucky scheme. *Amici* contend that Kentucky's exemption of these bonds, at the very least, plainly violates the Commerce Clause. See Brief for Alan D. Viard et al. as *Amici Curiae* 25–26. This argument, however, was not considered below, was never pressed by the Davises themselves, and is barely developed by *amici*. Moreover, we cannot tell with certainty what the consequences would be of holding that Kentucky violates the Commerce Clause by exempting such bonds; we must assume that it could disrupt important projects that the States have deemed to have public purposes. Accordingly, it is best to set this argument aside and leave for another day any

Kentucky piggybacks on this exclusion, but only up to a point: it adds "interest income derived from obligations of sister states and political subdivisions thereof" back into the taxable net. Ky. Rev. Stat. Ann. § 141.010(10)(c). Interest on bonds issued by Kentucky and its political subdivisions is thus entirely exempt,[3] whereas interest on municipal bonds of other States and their subdivisions is taxable. (Interest on bonds issued by private entities is taxed by Kentucky regardless of the private issuer's home.)

The ostensible reason for this regime is the attractiveness of tax-exempt bonds at "lower rates of interest . . . than that paid on taxable . . . bonds of comparable risk." M. Graetz & D. Schenk, Federal Income Taxation 215 (5th ed. 2005) (hereinafter Graetz & Schenk). Under the Internal Revenue Code, for example, see 26 U. S. C. § 103, "if the market rate of interest is 10 percent on a comparable corporate bond, a municipality could pay only 6.5 percent on its debt and a purchaser in a 35 percent marginal tax bracket would be indifferent between the municipal and the corporate bond, since the after-tax interest rate on the corporate bond is 6.5 percent," Graetz & Schenk 215.[4] The differential tax scheme in Kentucky works the same way; the Commonwealth's tax benefit to residents who buy its bonds makes

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claim that differential treatment of interest on private-activity bonds should be evaluated differently from the treatment of municipal bond interest generally.

[3]There are some exceptions which derive from the federal exclusion, see 26 U. S. C. § 103(b), but they do not matter here.

[4]The amount of this benefit to municipal issuers can be approximated by comparing the interest rates on municipal bonds to those on Treasury bonds, which are also exempt from state taxation but are subject to federal taxation. "[A]t the end of 2006, the borrowing costs on AAA-rated, 10-year municipal bonds on average were 80.3 percent of comparable, but federally taxable, U. S. Treasury securities, [and] at the end of 2005 the borrowing costs on such municipal bonds were 88.4 percent of comparable U. S. Treasury bonds." Brief for National Federation of Municipal Analysts as *Amicus Curiae* 8, n. 4 (hereinafter National Federation Brief).

lower interest rates acceptable,[5] while limiting the exception to Kentucky bonds raises in-state demand for them without also subsidizing other issuers.

The significance of the scheme is immense. Between 1996 and 2002, Kentucky and its subdivisions issued $7.7 billion in long-term bonds to pay for spending on transportation, public safety, education, utilities, and environmental protection, among other things. IRS, Statistics of Income Bulletin, C. Belmonte, Tax-Exempt Bonds, 1996–2002, pp. 169–170, http://www.irs.gov/pub/irs-soi/02govbnd.pdf (as visited Jan. 23, 2008, and available in Clerk of Court's case file). Across the Nation during the same period, States issued over $750 billion in long-term bonds, with nearly a third of the money going to education, followed by transportation (13%) and utilities (11%). See *ibid.* Municipal bonds currently finance roughly two-thirds of capital expenditures by state and local governments. L. Thomas, Money, Banking and Financial Markets 55 (2006).

Funding the work of government this way follows a tradition going back as far as the 17th century. See Johnson & Rubin, The Municipal Bond Market: Structure and Changes, in Handbook of Public Finance 483, 485 (F. Thompson & M. Green eds. 1998) ("[In] 1690 . . . Massachusetts issued bills of credit to pay soldiers who had participated in an unsuccessful raid on the City of Quebec"). Municipal bonds first appeared in the United States in the early 19th century: "New York City began to float [debt] securities in about 1812," A. Hillhouse, Municipal Bonds: A Century of Experience 31 (1936) (hereinafter Hillhouse), and by 1822 Boston "had a bonded debt of $100,000," *id.*, at 32. The municipal bond market had swelled by the mid-1840s, when the aggregate

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[5] The precise reduction in interest rates depends on the federal and state income tax rates, the credit rating of the issuer, the term of the bond, and market factors. See *id.*, at 8. The reduction in interest rates is generally greater the higher are a State's income tax rates. See *id.*, at 9, and n. 6.

debt of American cities exceeded $27 million, and the total debt of the States was nearly 10 times that amount. See *ibid.* Bonds funded some of the great public works of the day, including New York City's first water system, see *id.*, at 31, and the Erie Canal, see R. Amdursky & C. Gillette, Municipal Debt Finance Law § 1.2.1, p. 15 (1992) (hereinafter Amdursky & Gillette). At the turn of the 20th century, the total state and municipal debt was closing in on $2 billion, see Hillhouse 35, and by the turn of the millennium, over "$1.5 trillion in municipal bonds were outstanding," J. Temel, The Fundamentals of Municipal Bonds, p. ix (5th ed. 2001).

Differential tax schemes like Kentucky's have a long pedigree, too. State income taxation became widespread in the early 20th century, see A. Comstock, State Taxation of Personal Incomes 11 (1921) (reprinted 2005) (hereinafter Comstock), and along with the new tax regimes came exemptions and deductions, see *id.*, at 171–184, to induce all sorts of economic behavior, including lending to state and local governments at favorable rates of untaxed interest. New York enacted the first of these statutes in 1919, see 1919 N. Y. Laws pp. 1641–1642, the same year it imposed an income tax, see Comstock 104,[6] and other States followed, see, *e. g.*, 1921 N. C. Sess. Laws p. 208; 1923 N. H. Laws p. 78; 1926 Va. Acts ch. 576, pp. 960–961, with Kentucky joining the pack in 1936, see 1936 Ky. Acts p. 71. Today, 41 States have laws like the one before us.[7]

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[6]The Federal Government got in the game even earlier. Municipal bonds were exempted from "every federal income tax act enacted since passage of the Sixteenth Amendment" in 1913. Amdursky & Gillette § 7.2.1, at 440.

[7]This figure includes Kentucky and 36 other States that have schemes that are nearly identical to Kentucky's. See Ala. Code §§ 40–18–4, 40–18–14(3)(f) (2003); Ariz. Rev. Stat. Ann. § 43–1021(3) (West Supp. 2007); Ark. Code Ann. § 26–51–404(b)(5) (Supp. 2007); Cal. Rev. & Tax. Code Ann. § 17133 (West 2004); Colo. Rev. Stat. Ann. § 39–22–104(3)(b) (2007); Conn. Gen. Stat. § 12–701(a)(20)(A)(i) (2007); Del. Code Ann., Tit. 30, § 1106(a)(1) (1997); Ga. Code Ann. § 48–7–27(b)(1)(A) (2005); Haw. Rev. Stat. §§ 39–11,

B

Petitioners (for brevity, Kentucky or the Commonwealth) collect the Kentucky income tax. Respondents George and Catherine Davis are Kentucky residents who paid state income tax on interest from out-of-state municipal bonds, and then sued the tax collectors in state court on a refund claim that Kentucky's differential taxation of municipal bond income impermissibly discriminates against interstate commerce in violation of the Commerce Clause of the National Constitution. The trial court granted judgment to the Com-

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47–13 (1993), 235–7(a)(6), (b)(2) (2001); Idaho Code §§63–3022M(1), (3)(b) (Lexis 2007); Kan. Stat. Ann. §79–32,117(b)(i) (2006 Cum. Supp.); La. Stat. Ann. §§47:48, 47:293(9)(a), (b) (West 2001 and Supp. 2008); Me. Rev. Stat. Ann., Tit. 36, §5122(1)(A) (Supp. 2007); Md. Tax-Gen. Code Ann. §10–204(b) (Lexis Supp. 2007); Mass. Gen. Laws, ch. 62, §2(a)(1)(A) (West 2006); Mich. Comp. Laws Ann. §206.30(1)(a) (West Supp. 2007); Minn. Stat. §290.01, subd. 19a(1)(i) (2006); Miss. Code Ann. §27–7–15(4)(d) (Supp. 2007); Mo. Rev. Stat. §143.121(2)(b) (2007 Supp.); Mont. Code Ann. §15–30–111(2)(a)(i) (2007); Neb. Rev. Stat. §77–2716(1)(c) (2007 Supp.); N. H. Rev. Stat. Ann. §77:4(I) (Supp. 2007); N. J. Stat. Ann. §54A:6–14 (West 2002); N. M. Stat. Ann. §§7–2–2(B)(3), (V) (2005); N. Y. Tax Law Ann. §612(b)(1) (West 2006); N. C. Gen. Stat. Ann. §§105–134.6(b)(1)(b), (c)(1) (Lexis 2005); N. D. Cent. Code Ann. §57–38–01.2(1)(g) (Lexis Supp. 2007); Ohio Rev. Code Ann. §5747.01(A)(1) (Lexis Supp. 2007); Ore. Rev. Stat. §316.680(2)(a) (2003); Pa. Stat. Ann., Tit. 72, §9901 (Purdon 2000); R. I. Gen. Laws §44–30–12(b)(1) (Supp. 2007); S. C. Code Ann. §12–6–1120(1) (2000); Tenn. Code Ann. §67–2–104(e)(1) (2006); Vt. Stat. Ann., Tit. 32, §5811(18)(A)(i)(II) (2007); Va. Code Ann. §§58.1–322(B)(1), (C)(2) (Lexis Supp. 2007); W. Va. Code Ann. §§11–21–12(b)(1), (c)(2) (Lexis Supp. 2007). It also includes four States that tax out-of-state municipal bonds and exempt some, but not all, in-state municipal bonds. See Iowa Code §422.7(36) (2005); Okla. Stat., Tit. 68, §§2358.5, 2358.5A (West 2007 Supp.); Wis. Stat. §71.05(1)(c) (2003–2004); compare Ill. Comp. Stat., ch. 35, §5/203(a)(2)(A) (West 2006), with ch. 45, §35/80(e). Of the remaining States, Utah exempts its own bonds, and extends reciprocal treatment to the bonds of States that do not tax Utah bonds, see Utah Code Ann. §§59–10–114(1)(g), (6) (Lexis 2007 Supp.); Indiana exempts all municipal bonds, see Ind. Code §6–3–1–3.5 (West 2004); and the balance have no personal income tax.

monwealth, relying in part on our cases recognizing the "market-participant" exception to the dormant Commerce Clause limit on state regulation. See App. to Pet. for Cert. A18–A19 (citing *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980), and *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976)).

The Court of Appeals of Kentucky reversed. See 197 S. W. 3d 557 (2006). In a brief discussion, it rejected the reasoning of an Ohio case upholding a similar tax scheme challenged under the Commerce Clause, see *id.*, at 563 (discussing *Shaper* v. *Tracy*, 97 Ohio App. 3d 760, 647 N. E. 2d 550 (1994)), and distinguished our market participant cases, see 197 S. W. 3d, at 564, as well as a decision from the 19th century the Commonwealth relied on, see *id.*, at 563–564 (discussing *Bonaparte* v. *Tax Court*, 104 U. S. 592 (1882)). The Court of Appeals thought it had "no choice but to find that Kentucky's system of taxing only extraterritorial bonds runs afoul of the Commerce Clause," 197 S. W. 3d, at 564, and the Supreme Court of Kentucky denied the Commonwealth's motion for discretionary review, see App. to Pet. for Cert. A14.

We granted certiorari owing to the conflict this raised on an important question of constitutional law, and because the result reached casts constitutional doubt on a tax regime adopted by a majority of the States. 550 U. S. 956 (2007). We now reverse.

II

The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, and although its terms do not expressly restrain "the several States" in any way, we have sensed a negative implication in the provision since the early days, see, *e. g.*, *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318–319 (1852); cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 209 (1824) (Marshall, C. J.) (dictum). The modern law of what has come to be called the dormant Commerce Clause is driven by concern about "economic protec-

tionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 273–274 (1988). The point is to "effectuat[e] the Framers' purpose to 'prevent a State from retreating into [the] economic isolation,'" *Fulton Corp.* v. *Faulkner*, 516 U. S. 325, 330 (1996) (quoting *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 180 (1995); brackets omitted), "that had plagued relations among the Colonies and later among the States under the Articles of Confederation," *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979).

The law has had to respect a cross-purpose as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy. Compare The Federalist Nos. 7 (A. Hamilton), 11 (A. Hamilton), and 42 (J. Madison), with The Federalist No. 51 (J. Madison); see also *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal").

Under the resulting protocol for dormant Commerce Clause analysis, we ask whether a challenged law discriminates against interstate commerce. See *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99 (1994). A discriminatory law is "virtually *per se* invalid," *ibid.*; see also *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978), and will survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," *Oregon Waste Systems*, *supra*, at 101 (internal quotation marks omitted); see also *Maine* v. *Taylor*, 477 U. S. 131, 138 (1986). Absent discrimination for the forbidden purpose, however, the law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the puta-

tive local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). State laws frequently survive this *Pike* scrutiny, see, *e. g.*, *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 346–347 (2007) (plurality opinion); *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kan.*, 489 U. S. 493, 525–526 (1989); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 472–474 (1981), though not always, as in *Pike* itself, 397 U. S., at 146.

Some cases run a different course, however, and an exception covers States that go beyond regulation and themselves "participat[e] in the market" so as to "exercis[e] the right to favor [their] own citizens over others." *Alexandria Scrap*, *supra*, at 810. This "market-participant" exception reflects a "basic distinction . . . between States as market participants and States as market regulators," *Reeves*, 447 U. S., at 436, "[t]here [being] no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market," *id.*, at 437. See also *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204, 208 (1983) ("[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause"). Thus, in *Alexandria Scrap*, we found that a state law authorizing state payments to processors of automobile hulks validly burdened out-of-state processors with more onerous documentation requirements than their in-state counterparts. Likewise, *Reeves* accepted South Dakota's policy of giving in-state customers first dibs on cement produced by a state-owned plant, and *White* held that a Boston executive order requiring half the workers on city-financed construction projects to be city residents passed muster.

Our most recent look at the reach of the dormant Commerce Clause came just last Term, in a case decided independently of the market participation precedents. *United Haulers*, *supra*, upheld a "flow control" ordinance requiring

trash haulers to deliver solid waste to a processing plant owned and operated by a public authority in New York State. We found "[c]ompelling reasons" for "treating [the ordinance] differently from laws favoring particular private businesses over their competitors." *Id.*, at 342. State and local governments that provide public goods and services on their own, unlike private businesses, are "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens," *ibid.*, and laws favoring such States and their subdivisions may "be directed toward any number of legitimate goals unrelated to protectionism," *id.*, at 343. That was true in *United Haulers*, where the ordinance addressed waste disposal, "both typically and traditionally a local government function." *Id.*, at 344 (quoting *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 261 F. 3d 245, 264 (CA2 2001) (Calabresi, J., concurring); internal quotation marks omitted). And if more had been needed to show that New York's object was consequently different from forbidden protectionism, we pointed out that "the most palpable harm imposed by the ordinances—more expensive trash removal—[was] likely to fall upon the very people who voted for the laws," rather than out-of-state interests. *United Haulers*, 550 U. S., at 345. Being concerned that a "contrary approach . . . would lead to unprecedented and unbounded interference by the courts with state and local government," *id.*, at 343, we held that the ordinance did "not discriminate against interstate commerce for purposes of the dormant Commerce Clause," *id.*, at 342.[8]

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[8] In so holding, we distinguished our decision in *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383 (1994), which struck down a very similar ordinance on Commerce Clause grounds. The *Carbone* ordinance, however, benefited a private processing facility, and we found "this difference constitutionally significant" for the reasons adverted to in the main text. See *United Haulers*, 550 U. S., at 334. Although the *Carbone* dissent argued that the private facility was "essentially a municipal facility," 511 U. S., at 419 (opinion of SOUTER, J.), *United Haulers* relied on the apparent view

III

A

It follows *a fortiori* from *United Haulers* that Kentucky must prevail. In *United Haulers*, we explained that a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors. See *id.*, at 343 ("Laws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism"); see also *id.*, at 344 (noting that "[w]e should be particularly hesitant to interfere . . . under the guise of the Commerce Clause" where a local government engages in a traditional government function).[9] This logic applies with even greater force to

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of the *Carbone* majority that the facility was properly characterized as private, see 550 U. S., at 339–340.

[9]JUSTICE KENNEDY's dissent (hereinafter dissent) says this is just circular rationalization, that the *United Haulers* acceptance of governmental preference in support of public health, safety, and welfare is the equivalent of justifying the law as an exercise of the "'police power'" and thus an exercise in "tautology," since almost any state law could be so justified. See *post*, at 365. But this misunderstands what we said in *United Haulers*. The point of asking whether the challenged governmental preference operated to support a traditional public function was not to draw fine distinctions among governmental functions, but to find out whether the preference was for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local. Under *United Haulers*, governmental public preference is constitutionally different from commercial private preference, and we make the governmental responsibility enquiry to identify the beneficiary as one or the other. See *supra*, at 339–340; *United Haulers*, *supra*, at 343. Because this is the distinction at which the enquiry about traditional governmental activity is aimed, it entails neither tautology nor the hopeless effort to pick and choose among legitimate governmental activity that led to *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985).

One of the two fundamental points of difference between the Court and the dissenters is the dissenters' rejection of the constitutional distinction between public and private preference, see *post*, at 367, 371, 372; the dis-

laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function, with the venerable history we have already sketched, see *supra*, at 334–335. By issuing bonds, state and local governments "sprea[d] the costs of public projects over time," Amdursky & Gillette § 1.1.3, at 11, much as one might buy a house with a loan subject to monthly payments. Bonds place the cost of a project on the citizens who benefit from it over the years, see *ibid.*, and they allow for public work beyond what current revenues could support, see *id.*, § 1.2, at 12–13. Bond proceeds are thus the way to shoulder the cardinal civic responsibilities listed in *United Haulers:* protecting the health,[10] safety,[11] and welfare[12] of citizens. It should go without saying that the apprehension in *United Haulers* about "unprecedented . . . interference" with a traditional government function is just as warranted here, where the Davises would have us invalidate a century-old taxing practice, see *supra*, at 335, presently employed by 41 States, see n. 7, *supra*, and affirmatively supported by all of them, see Brief for 49 States as *Amici Curiae*.

In fact, this emphasis on the public character of the enterprise supported by the tax preference is just a step in addressing a fundamental element of dormant Commerce Clause jurisprudence, the principle that "any notion of discrimination assumes a comparison of substantially similar entities." *United Haulers*, *supra*, at 342 (quoting *General*

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senters thus carry on the battle that was fought in *United Haulers*. (The second fundamental difference goes to the realism and legitimacy of treating bond issuance and tax provisions as aggregated features of a single scheme of public finance. Compare *infra*, at 344–345, with *post*, at 367, 374–375.)

[10] See, *e. g.*, The Bond Buyer, Apr. 20, 2007, p. 31, col. 2 (describing bond issue by the Grayson County Public Hospital District Corporation).

[11] See, *e. g.*, *id.*, June 20, 2007, at 29, col. 3 (describing bond issue by Todd County for a "Detention Facility Project").

[12] See, *e. g.*, *id.*, Apr. 20, 2007, at 31, cols. 2–3 (describing bond issue by the Johnson County School District Finance Corporation).

Motors Corp. v. *Tracy*, 519 U. S. 278, 298 (1997); internal quotation marks omitted). In *Bonaparte*, 104 U. S. 592, a case involving the Full Faith and Credit Clause, we held that a foreign State is properly treated as a private entity with respect to state-issued bonds that have traveled outside its borders. See *id.*, at 595 (beyond its borders, a debtor State "is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals," and has none "of the attributes of sovereignty as to the debt it owes"). Viewed through this lens, the Kentucky tax scheme parallels the ordinance upheld in *United Haulers:* it "benefit[s] a clearly public [issuer, that is, Kentucky], while treating all private [issuers] exactly the same." 550 U. S., at 342. There is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being "substantially similar" to the other bond issuers in the market.[13]

Thus, *United Haulers* provides a firm basis for reversal. Just like the ordinances upheld there, Kentucky's tax exemption favors a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests. This type of law does "not 'discriminate against interstate commerce' for purposes of the dormant Commerce Clause." *Id.*, at 345.

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This case, like *United Haulers*, may also be seen under the broader rubric of the market participation doctrine, although the Davises say that market participant cases are inapposite here. In their view, we may not characterize state action under the Kentucky statutes as market activity for public purposes, because this would ignore a fact absent in *United*

[13] Contrary to the dissent, see *post*, at 371–372, we do not suggest that the only market at issue here is a discrete market for Kentucky bonds. In fact, we recognize that the relevant market can be conceived more broadly. See *infra*, at 350–351. Our point goes not to the contours of the market, but to the proper characterization of the various entities acting in the market.

Haulers but central here: this is a case about differential taxation, and a difference that amounts to a heavier tax burden on interstate activity is forbidden, see, *e. g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564 (1997) (invalidating statute exempting charities from real estate and personal property taxes unless conducted or operated principally for the benefit of out-of-state residents); *Fulton Corp.*, 516 U. S. 325 (striking down tax on corporate stock held by state residents, where rate of tax was inversely proportional to the corporation's exposure to the State's income tax); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984) (holding excise tax on sale of liquor at wholesale unconstitutional because it exempted some locally produced alcoholic beverages).

The Davises make a fair point to the extent that they argue that Kentucky acts in two roles at once, issuing bonds and setting taxes, and if looked at as a taxing authority it seems to invite dormant Commerce Clause scrutiny of its regulatory activity, see *Walling* v. *Michigan*, 116 U. S. 446, 455 (1886) ("A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress"); see also *Camps Newfound*, *supra*, at 578 ("[I]t is clear that discriminatory burdens on interstate commerce imposed by regulation or taxation may . . . violate the Commerce Clause"); *Tracy*, *supra*, at 287 ("The negative or dormant implication of the Commerce Clause prohibits state taxation . . . that discriminates against or unduly burdens interstate commerce").

But there is no ignoring the fact that imposing the differential tax scheme makes sense only because Kentucky is also a bond issuer. The Commonwealth has entered the market for debt securities, just as Maryland entered the market for automobile hulks, see *Alexandria Scrap*, 426 U. S., at 806,

and South Dakota entered the cement market, see *Reeves*, 447 U. S., at 440. It simply blinks this reality to disaggregate the Commonwealth's two roles and pretend that in exempting the income from its securities, Kentucky is independently regulating or regulating in the garden variety way that has made a State vulnerable to the dormant Commerce Clause. States that regulated the price of milk, see, *e. g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186 (1994); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), did not keep herds of cows or compete against dairy producers for the dollars of milk drinkers. But when Kentucky exempts its bond interest, it is competing in the market for limited investment dollars, alongside private bond issuers and its sister States, and its tax structure is one of the tools of competition.[14]

The failure to appreciate that regulation by taxation here goes hand in hand with market participation by selling bonds allows the Davises to advocate the error of focusing exclusively on the Commonwealth as regulator and ignoring the Commonwealth as bondseller, see Brief for Respondents 36–39, just as the state court did in saying that "'when a state chooses to tax its citizens, it is acting as a market regulator[,]' not as a market participant." 197 S. W. 3d, at 564 (quoting *Shaper*, 97 Ohio App. 3d, at 764, 647 N. E. 2d, at 552).[15] To indulge in this single vision, however, would require overruling most, if not all, of the cases on point decided since *Alexandria Scrap*.

White, for example, also scrutinized a government acting in dual roles. The mayor of Boston promulgated an executive order that bore the hallmarks of regulation: it applied to every construction project funded wholly or partially by city funds (or funds administered by the city), and it imposed

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[14]The dissent overlooks this discussion when it claims that we contend Kentucky does not compete with other municipal bond issuers. See *post*, at 368.

[15]The dissent does the same. See *post*, at 367, 374–375.

general restrictions on the hiring practices of private contractors, mandating that 50% of their work forces be bona fide Boston residents and setting thresholds for minorities (25%) and women (10%) as well. See 460 U. S., at 205, n. 1; see also *id.*, at 218–219 (Blackmun, J., concurring in part and dissenting in part) ("The executive order in this case . . . is a direct attempt to govern private economic relationships. . . . [It] is the essence of regulation"). At the same time, the city took part in the market by "expend[ing] . . . its own funds in entering into construction contracts for public projects." *Id.*, at 214–215 (opinion of the Court). After speaking of "'[t]he basic distinction . . . between States as market participants and States as market regulators,'" *id.*, at 207 (quoting *Reeves*, *supra*, at 436–437), *White* did not dissect Boston's conduct and ignore the former. Instead, the Court treated the regulatory activity in favor of local and minority labor as terms or conditions of the government's efforts in its market role, which was treated as dispositive.

Similarly, in *Alexandria Scrap*, Maryland employed the tools of regulation to invigorate its participation in the market for automobile hulks. The specific controversy there was over documentation requirements included in a "comprehensive statute designed to speed up the scrap cycle." 426 U. S., at 796. Superficially, the scheme was regulatory in nature; but the Court's decision was premised on its view that, in practical terms, Maryland had not only regulated but had also "entered into the market itself to bid up [the] price" of automobile hulks. See *id.*, at 806.

United Haulers, though not placed under the market participant umbrella, may be seen as another example. Not only did the public authority acting in that case process trash, but its governmental superiors forbade trash haulers to deal with any other processors. This latter fact did not determine the outcome, however; the dispositive fact was the government's own activity in processing trash. We upheld the government's decision to shut down the old market for

trash processing only because it created a new one all by itself, and thereby became a participant in a market with just one supplier of a necessary service. If instead the government had created a monopoly in favor of a private hauler, we would have struck down the law just as we did in *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383 (1994). *United Haulers* accordingly turned on our decision to give paramount consideration to the public function in actively dealing in the trash market; if the Davises had their way, *United Haulers* would be overruled and the market participation doctrine would describe a null set (or maybe a set of one, see *Reeves*, *supra*).

In each of these cases the commercial activities by the governments and their regulatory efforts complemented each other in some way, and in each of them the fact of tying the regulation to the public object of the foray into the market was understood to give the regulation a civic objective different from the discrimination traditionally held to be unlawful: in the paradigm of unconstitutional discrimination the law chills interstate activity by creating a commercial advantage for goods or services marketed by local private actors, not by governments and those they employ to fulfill their civic objectives, see, *e. g.*, *Fulton Corp.*, 516 U. S. 325 (higher tax on the stock of corporations with little or no presence in the State); *New Energy Co. of Ind.*, 486 U. S. 269 (tax credit to sellers of ethanol available only for ethanol produced in the State); *Bacchus Imports, Ltd.*, 468 U. S. 263 (tax exemption that applied only to sales of certain locally produced liquors); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27 (1980) (prohibition on out-of-state banks owning in-state businesses that provided investment advisory services); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977) (higher tax on sale of securities by nonresidents if the securities were sold on an out-of-state, not an in-state, exchange). In sum, our cases on market regulation without market participation prescribe standard dormant Commerce

Clause analysis; our cases on market participation joined with regulation (the usual situation) prescribe exceptional treatment for this direct governmental activity in commercial markets for the public's benefit.[16]

The Kentucky tax scheme falls outside the forbidden paradigm because the Commonwealth's direct participation favors, not local private entrepreneurs, but the Commonwealth and local governments. The Commonwealth enacted its tax code with an eye toward making some or all of its bonds more marketable. When it issues them for sale in the bond market, it relies on that tax code, and seller and purchaser treat the bonds and the tax rate as joined just as intimately, say, as the work force requirements and city construction contracts were in Boston. Issuing bonds must therefore have the same significance under the dormant Commerce Clause as government trash processing, junk car disposal, or construction; and *United Haulers*, *Alexandria Scrap*, and *White* can be followed only by rejecting the Davises' argument that Kentucky's regulatory activity should be viewed in isolation as Commerce Clause discrimination.[17]

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[16] Significantly, our market participant cases are not limited to cases where the government supplies a uniquely public product. This much is manifest from *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980). There is nothing remarkable or inherently governmental about the cement South Dakota produced, and yet we recognized that the State may engage in clear discrimination against out-of-state buyers that regular dormant Commerce Clause analysis would undoubtedly have held unconstitutional.

[17] The dissent criticizes this analysis on the basis of our statement in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 593 (1997), that "[a] tax exemption is not the sort of direct state involvement in the market that falls within the market-participation doctrine." See *post*, at 374–375. This both misses the point and leaves the language from *Camps Newfound* shorn of context. In *Camps Newfound*, the tax exemption was unaccompanied by any market activity by the State; it favored only private charitable institutions. We correctly rejected the argument that a tax exemption without more constitutes market participation. But we had no occasion to consider the scheme here, where a State employs a

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A look at the specific markets in which the exemption's effects are felt both confirms the conclusion that no traditionally forbidden discrimination is underway and points to the distinctive character of the tax policy. The market as most broadly conceived is one of issuers and holders of all fixed-income securities, whatever their source or ultimate destination. In this interstate market, Kentucky treats income from municipal bonds of other States just like income from bonds privately issued in Kentucky or elsewhere; no preference is given to any local issuer, and none to any local holder, beyond what is entailed in the preference Kentucky grants itself when it engages in activities serving public objectives.

A more specialized market can be understood as commerce solely in federally tax-exempt municipal bonds, much of it

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tax exemption to facilitate its own participation in the market. As noted before, one of the dissent's critical premises is the disaggregation of bond issuance and tax treatment, see *post*, at 367, 374; that strikes us as a denial of economic reality.

The dissent also suggests that our reasoning conflicts with *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82 (1984), see *post*, at 375, but there is no conflict. In *South-Central*, Alaska conditioned the sale of state timber to private purchasers by requiring that the timber be processed within the State prior to export, and a plurality struck down the condition under the Commerce Clause. The case turned on the plurality's conclusion that the processing requirement constituted a "restrictio[n] on dispositions subsequent to the goods coming to rest in private hands." 467 U. S., at 98; see *id.*, at 95 ("Under the Alaska requirement, . . . the choice is made for [the purchaser]: if he buys timber from the State he is not free to take the timber out of state prior to processing"). Kentucky imposes no such restrictions on the disposition of Kentucky bonds; bondholders are free to sell the bonds to whomever they please. Thus, the type of "downstream regulation" that *South-Central* found objectionable is simply not present here. *Id.*, at 99. We note also that *South-Central* expressly applied "more rigorous" Commerce Clause scrutiny because the case involved "foreign commerce" and restrictions on the resale of "a natural resource." *Id.*, at 100, 96. Neither of those elements appears here.

conducted through interstate municipal bond funds.[18] Here, of course, the distinction between the taxing State's bonds and their holders and issuers and holders of out-of-state counterparts is at its most stark. But what is remarkable about the issuers in this and the broader interstate market is that nearly every taxing State believes its public interests are served by the same tax-and-exemption feature, which is supported in this Court by every one of the States (with or without an income tax) despite the ranges of relative wealth and tax rates among them. See Brief for 49 States as *Amici Curiae*. These facts suggest that no State perceives any local advantage or disadvantage beyond the permissible ones open to a government and to those who deal with it when that government itself enters the market. See *supra*, at 344–348.

An equally significant perception emerges from examining the third type of market for municipal bonds: the one for bonds within the State of issue, a large proportion of which market in each State is managed by one or more single-state funds. By definition, there is no discrimination against interstate activity within the market itself, but one of its features reveals an important benefit of intrastate bond markets as they operate through these funds. The intrastate

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[18] See National Federation Brief 11 ("In 2006, tax-exempt mutual funds held approximately $365 billion in long-term [municipal] bonds, of which approximately $155 billion were held in 481 single-state funds and approximately $210 billion in 230 national funds . . . [and, as of March 2007,] approximately $254 billion [in short-term municipal bonds] were held in national tax-exempt money market funds and approximately $125 billion in single state tax-exempt money market funds" (citing Investment Company Institute, 2007 Investment Company Fact Book 96, 98; Lipper Analytical Services, Tax-Exempt Fixed Income Fund Performance Analysis, 1st Quarter 2007 Report)); National Federation Brief 12 ("[A]pproximately 58% of . . . long-term municipal bonds [owned by mutual funds] and approximately 67% of . . . short-term municipal securities were purchased without regard to a match between the state of the bond issuer and the state of the fund's shareholders").

funds absorb securities issued by smaller or lesser known municipalities that the interstate markets tend to ignore. See National Federation Brief 15 (compared with single-state funds, "[n]ational mutual funds . . . are less likely to dedicate the time necessary to evaluate a small, obscure or infrequent municipal bond issuer or to purchase bonds issued by such public entities"); *id.*, at 19 ("[N]ational mutual funds place a higher premium on the liquidity of their holdings than do single state funds, which are willing to purchase less liquid municipal bonds of smaller and less familiar issuers because of the state tax advantage and the fund's mandate to purchase bonds issued within a specific state").

There is little doubt that many single-state funds would disappear if the current differential tax schemes were upset. See *id.*, at 18 ("[O]ne predictable impact of the elimination of tax incentives for the purchase of municipal bonds issued in a specific state would be the disappearance, through consolidation into national mutual funds, of single state mutual funds"); *ibid.* ("Although a handful of single state funds might continue to exist for a small number of states (such as Florida) with high populations that have a high affinity for local bond issuers, the current state tax system is the *raison d'etre* for virtually all single state funds, and they would cease to be financially viable in the absence of a tax advantage that outweighed their relative lack of diversification vis-à-vis national funds and their reduced asset base"); accord, Brief for Respondents 29 (the States' tax exemptions "have fostered the growth of funds that hold only the municipal bonds of a single state," which "[a]s compared [with] national tax-exempt bonds funds . . . tend to be higher risk and higher cost"); 11 Kiplinger's Retirement Report, Win With Home-State Muni Bond Funds, p. 2 (Dec. 2004) (noting that in States without a differential taxation scheme, "there's little incentive to create [single-state] muni bond funds").

Nor is there any suggestion that the interstate markets would discover some new reason to welcome the weaker mu-

nicipal issues that would lose their local market homes after a victory for the Davises here. See National Federation Brief 18, 19 ("The main adverse impact of the disappearance of single state funds . . . would be felt by small municipal issuers" because they "would stand to lose much of the intrastate market for the bonds that has developed under the currently prevailing state tax system without gaining much of an interstate market from its elimination"). Financing for long-term municipal improvements would thus change radically if the differential tax feature disappeared.[19]

This probable indispensability of the current scheme to maintaining single-state markets serving smaller municipal borrowers not only underscores how far the States' objectives probably lie from the forbidden protectionism for local business; it also tends to explain why the States are so committed to a taxing practice that much scholarship says often produces a net burden of tax revenues lost over interest expense saved. See, *e. g.*, Brief for Alan D. Viard et al. as *Amici Curiae* 19 ("[S]tates routinely fail to recoup the cost of the tax subsidy in the form of lower financing rates" (citing Chalmers, Default Risk Cannot Explain the Muni Puzzle: Evidence From Municipal Bonds That Are Secured by U. S. Treasury Obligations, 11 Rev. Financial Studies 281, 282–283 (1998))).

In sum, the differential tax scheme is critical to the operation of an identifiable segment of the municipal financial market as it currently functions, and this fact alone demonstrates that the unanimous desire of the States to preserve the tax

[19] The Davises themselves, in their opposition to the petition, explain that if the tax exemptions are removed, "states will open their investment sales to the entire national market for debt instruments." Brief in Opposition 10–11. As a result, the Davises say, "[o]nce states compete in the financial markets without the protective benefit of coercive tax schemes, they will have to be more selective in what projects they choose to fund. . . . [T]he market will provide incentives for governments to be more careful in selecting and funding projects through bond sales." *Id.*, at 11, n. 5.

feature is a far cry from the private protectionism that has driven the development of the dormant Commerce Clause. It is also fatal to the Davises' backup argument that this case should be remanded for analysis under the rule in *Pike*, 397 U. S. 137.

IV

Concluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges, for we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice. See *id.*, at 142. The Kentucky courts made no *Pike* enquiry, and the Davises ask us to remand for one now, see Brief for Respondents 43.

The Davises' request for *Pike* balancing assumes an answer to an open question: whether *Pike* even applies to a case of this sort. *United Haulers* included a *Pike* analysis, see 550 U. S., at 346–347 (plurality opinion), but our cases applying the market participant exception have not, see, *e. g.*, *White*, 460 U. S. 204; *Alexandria Scrap*, 426 U. S. 794. We need not decide this question today, however, for Kentucky has not argued that *Pike* is irrelevant, see Reply Brief for Petitioners 2, n. 1, and even on the assumption that a *Pike* examination might generally be in order in this type of case, the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden in this particular case.

The institutional difficulty is manifest in the very train of disadvantages that the Davises' counsel attributes to the current differential tax scheme:

> "First, it harms out-of-state issuers (*i. e.*, other States and their subdivisions) by blocking their access to in-

> vestment dollars in Kentucky. Second, it similarly harms out-of-state private sellers (*e. g.*, underwriters, individuals, and investment funds) who wish to sell their bonds in Kentucky. Third, it harms the national municipal bond market and its participants by distorting and impeding the free flow of capital. Fourth, it harms Kentucky investors by promoting risky, high-cost investment vehicles. Fifth, it harms the States by compelling them to enact competing discriminatory laws that decrease their net revenues." Brief for Respondents 9.

Even if each of these drawbacks does to some degree eventuate from the system, it must be apparent to anyone that weighing or quantifying them for a cost-benefit analysis would be a very subtle exercise. It is striking, after all, that most of the harms allegedly flowing directly or indirectly to Kentucky's sister States and their citizens have failed to dissuade even a single State from supporting the current system; every one of them, including States with no income tax, have lined up with Kentucky in this case.

The prospect for reliable *Pike* comparison dims even further when we turn to the benign function of the current system flagged a moment ago. Is any court in a position to evaluate the advantage of the current market for bonds issued by the smaller municipalities, the ones with no ready access to any other bond market than single-state funds? Consider that any attempt to place a definite value on this feature of the existing system would have to confront the what-if questions. If termination of the differential tax scheme jeopardized or eliminated most single-state funds (as the cited authorities predict), would some new source of capital take their place? Would the interstate markets accommodate the small issuers (as no cited authorities predict), or would the financing in question be replaced by current local taxation for long-term projects (unlikely, considering that

financially weaker borrowers are involved), or would state governments assume responsibility through their own bonds or by state taxation? Or would capital to some degree simply dry up, eliminating a class of municipal improvements?[20] And if some new source or sources of capital became available for these improvements in a given State, how likely is it that the new scheme would produce measurable net benefits to other States seeking capital, and how perceptibly would it produce a freer flow of funds? Money spent up front on increased local or state taxation is no more available for out-of-state investment than money invested in local bonds; sinking funds would be obviated, but what would the effect be on interstate capital flows?

What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all. See *Tracy*, 519 U. S., at 308 ("[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them"); cf. *Fulton Corp.*, 516 U. S., at 342 ("'[C]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes'" (quot-

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[20] History bears out the concern that poorer places may have a harder time taking on at least some types of local investments. See Goldin & Katz, The Shaping of Higher Education: The Formative Years in the United States, 1890 to 1940, 13 J. Econ. Perspectives 37, 50–55 (Winter 1999) (per capita spending on public universities depended on local wealth); Goldin, America's Graduation From High School: The Evolution and Spread of Secondary Schooling in the Twentieth Century, 58 J. Econ. Hist. 345, 369–372 (1998) (likewise for public high schools).

ing *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 589–590 (1983))).

While it is not our business to suggest that the current system be reconsidered, if it is to be placed in question a congressional forum has two advantages. Congress has some hope of acquiring more complete information than adversary trials may produce, and an elected legislature is the preferable institution for incurring the economic risks of any alteration in the way things have traditionally been done. And risk is the essence of what the Davises are urging here. It would miss the mark to think that the Kentucky courts, and ultimately this Court, are being invited merely to tinker with details of a tax scheme; we are being asked to apply a federal rule to throw out the system of financing municipal improvements throughout most of the United States, and the rule in *Pike* was never intended to authorize a court to expose the States to the uncertainties of the economic experimentation the Davises request.

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The dissent rightly praises the virtues of the free market, and it warns that our decision to uphold Kentucky's tax scheme will result in untoward consequences for that market. See, *e. g.*, *post*, at 375–376. But the warning is alarmism; going back to 1919 the state regimes of differential bond taxation have been elements of the national commerce without wilting the Commerce Clause. The threat would come, instead, from the dissent's approach, which to a certainty would upset the market in bonds and the settled expectations of their issuers based on the experience of nearly a century.

We have been here before. Our predecessors on this Court responded to an earlier invitation to the adventurism of overturning a traditional local taxing practice. Justice Holmes answered that "the mode of taxation is of long standing, and upon questions of constitutional law the long settled

habits of the community play a part . . . . [T]he fact that the system has been in force for a very long time is of itself a strong reason . . . for leaving any improvement that may be desired to the legislature." *Paddell* v. *City of New York*, 211 U. S. 446, 448 (1908).[21]

The judgment of the Court of Appeals of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Having dissented in both *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980), and *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330 (2007), it seems appropriate to state briefly why I would join the Court's opinion even if those cases had been decided differently. *Reeves* and *United Haulers* involved state participation in commercial markets—the market for cement in *Reeves* and the market for waste disposal in *United Haulers*. The state entities in those cases imposed burdens on the private market for commercial goods and services. In this case Kentucky and its local governmental units engage in no private trade or business; they are merely borrowers of funds needed to finance public improvements.

Putting to one side cases in which a State may create a "market that did not previously exist," see *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 815 (1976) (STEVENS, J., concurring), I agree with Justice Powell's view that when a "State enters the private market and operates a commercial

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[21] The dissent thinks the need to preserve existing financing practices is the true "controlling rationale" of our holding, *post*, at 375, but not acknowledged as such. As Justice Holmes's opinion shows, practical consequences have always been relevant in deciding the constitutionality of local tax laws. The practical considerations discussed here support the traditional distinction between permissible public preferences and the forbidden discriminations for the benefit of local private interests.

enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic Balkanization." *Reeves*, 447 U. S., at 449–450 (dissenting opinion). On the other hand, if a State merely borrows money "to pay for spending on transportation, public safety, education, utilities, and environmental protection," *ante*, at 334, it does not "operat[e] a commercial enterprise" for purposes of the dormant Commerce Clause. As the majority of this Court stressed in *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383 (1994)—and JUSTICE ALITO reiterated in his dissent in *United Haulers*—instead of enacting "flow control" waste disposal ordinances, the local governments would have been

> "free, of course, to 'subsidize the[ir] [program] through general taxes or municipal bonds. But having elected to use the open market to earn revenues for' their waste management program, [they] 'may not employ discriminatory regulation to give that [program] an advantage over rival businesses from out of State.'" 550 U. S., at 368 (quoting *Carbone*, 511 U. S., at 394; citation omitted).

A State's reliance on "general taxes or municipal bonds" to finance public projects does not merit the same Commerce Clause scrutiny as "operating a fee-for-service business enterprise in an area in which there is an established interstate market." 550 U. S., at 362 (ALITO, J., dissenting). I am not persuaded that the Commerce Clause analysis should change just because Kentucky chooses to make the interest it pays on its own municipal bonds, which is already tax exempt under federal law, also tax exempt under Kentucky law.

The citizens of Kentucky provide the natural market for the purchase of Kentucky's bonds because they are also the beneficiaries of the programs being financed. Moreover, it is their tax payments that will enable Kentucky to pay the interest on the bonds and to discharge its indebtedness. The tax exemption for Kentucky citizens enhances the marketability of Kentucky bonds in the Kentucky market, moti-

vating local support for local public improvements. Instead of issuing bonds, Kentucky could have borrowed funds from a Kentucky bank or issued notes to a syndicate of Kentucky lenders without implicating the Commerce Clause, even though such fundraising would preclude an equal amount of money in Kentucky from entering the interstate market for bonds.* Free tickets to the Kentucky Derby for purchasers of the bonds would have a comparable, though presumably lesser, effect. In my judgment state action that motivates the State's taxpayers to lend money to the State is simply not the sort of "burden" on interstate commerce that is implicated by our dormant Commerce Clause jurisprudence.

CHIEF JUSTICE ROBERTS, concurring in part.

I join all but Part III–B of the opinion of the Court. In my view, the case is readily resolved by last Term's decision in *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330 (2007). A majority of the Court shares this view. That being the case, I see no need to proceed to the alternative analysis in Part III–B.

JUSTICE SCALIA, concurring in part.

I join all but Part III–B and Part IV of the opinion of the Court. I will apply our negative Commerce Clause doctrine only when *stare decisis* compels me to do so. In my view it is "an unjustified judicial invention, not to be expanded beyond its existing domain." *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 312 (1997) (SCALIA, J., concurring). *Stare decisis* does not compel invalidation of Kentucky's statute. As the Court explains, it would be no small leap from invalidating state discrimination in favor of private entities to invali-

*Indeed, Kentucky could have just increased taxes. By issuing bonds in lieu of increasing taxes, Kentucky has enlarged the interstate market for securities, as well as increased the money available to Kentucky citizens to partake in this market.

dating state discrimination in favor of the State's own subdivisions performing a traditional governmental function. To apply the negative Commerce Clause in this area would broaden the doctrine "'beyond its existing scope, and intrude on a regulatory sphere traditionally occupied by . . . the States.'" *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 348 (2007) (SCALIA, J., concurring in part) (omission in original). That is enough for me.

I do not join Part III–B of the opinion of the Court because I think Part III–A adequately resolves the issue. I also do not join Part IV, which describes the question whether so-called *Pike* balancing applies to laws like this as an "open" one. *Ante*, at 353; see *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). The Court declines to engage in *Pike* balancing here because courts are ill suited to determining whether or not this law imposes burdens on interstate commerce that clearly outweigh the law's local benefits, and the "balancing" should therefore be left to Congress. See *ante*, at 353–356. The problem is that courts are less well suited than Congress to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. Here, on one end of the scale (the burden side) there rests a certain degree of suppression of interstate competition in borrowing; and on the other (the benefits side) a certain degree of facilitation of municipal borrowing. Of course you cannot decide which interest "outweighs" the other without deciding which interest is more important to you. And that will always be the case. I would abandon the *Pike*-balancing enterprise altogether and leave these quintessentially legislative judgments with the branch to which the Constitution assigns them. See *Bendix Autolite Corp.* v. *Midwesco Enterprises*,

Inc., 486 U. S. 888, 897–898 (1988) (SCALIA, J., concurring in judgment).

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that Kentucky's differential tax scheme is constitutional. But rather than apply a body of doctrine that "has no basis in the Constitution and has proved unworkable in practice," I would entirely "discard the Court's negative Commerce Clause jurisprudence." *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 349 (2007) (THOMAS, J., concurring in judgment). See also *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 429, 439 (2005) (same) ("'"[T]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application"'" (quoting *Hillside Dairy Inc.* v. *Lyons*, 539 U. S. 59, 68 (2003) (THOMAS, J., concurring in part and dissenting in part), in turn quoting *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 610 (1997) (THOMAS, J., dissenting))). Because Congress' authority to regulate commerce "among the several States," U. S. Const., Art. I, §8, cl. 3, necessarily includes the power "to prevent state regulation of interstate commerce," *United Haulers*, *supra*, at 349 (THOMAS, J., concurring in judgment), the text of the Constitution makes clear that the Legislature—not the Judiciary—bears the responsibility of curbing what it perceives as state regulatory burdens on interstate commerce.

As the Court acknowledges, Kentucky's differential tax scheme is far from unique. *Ante*, at 331–332. For nearly a century, some States have treated income derived from out-of-state bonds differently than that derived from their in-state counterparts. *Ibid.* At present, the vast majority of the States do so. *Ante*, at 335. The practice is thus both longstanding and widespread, yet Congress has refrained from pre-empting it. Cf. *New Jersey Realty Title Ins. Co.*

v. *Division of Tax Appeals of N. J.*, 338 U. S. 665, 671 (1950) (holding that a federal statute exempting interest-bearing obligations of the United States from state and local taxation pre-empted a conflicting state statute). In the "face of [this] congressional silence," *United Haulers*, *supra*, at 352 (THOMAS, J., concurring in judgment), we have no authority to invalidate Kentucky's differential tax scheme. I would reverse the judgment below on that basis.

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, dissenting.

Eighteenth-century thinkers, even those most prescient, could not foresee our technological and economic interdependence. Yet they understood its foundation. Free trade in the United States, unobstructed by state and local barriers, was indispensable if we were to unite to ensure the liberty and progress of the whole Nation and its people. This was the vision, and a primary objective, of the Framers of the Constitution. History, as we know, vindicates their judgment. The national, free market within our borders has been a singular force in shaping the consciousness and creating the reality that we are one in purpose and destiny. The Commerce Clause doctrine that emerged from the decisions of this Court has been appropriate and necessary to implement the Constitution's purpose and design.

These general observations are offered at the outset to underscore the imprudent risk the Court now creates by misinterpreting our precedents to decide this case. True, the majority opinion, wrong as it is, will not threaten the whole economy or national unity on these facts alone. The explicit, local discrimination the Court ratifies today likely will result in extra, though manageable, accommodation costs and can be welcomed by existing interests ready to profit from it. This market perhaps can absorb the costs of discrimination; our jurisprudence, unless the decision stands alone as an anomaly, cannot.

Reactive institutions and adjusting forces—for instance mutual funds for state and municipal bonds issued within a single State—already are in place in response to the local protectionist laws here at issue and now in vogue. These mechanisms may allow the market, though necessarily distorted by deviation from essential constitutional principles, to continue to cope in a more or less efficient manner; and the damage likely will be limited to the discrete, and now distorted, market for state and municipal bonds. Many economists likely will find it unfortunate, and inefficient, that a specialized business has emerged to profit from a departure from constitutional principles. Even if today's decision is welcomed by those who profit from the discrimination, the system as a whole would benefit from a return to a market with proper form, freed from artificial restraints. It does seem necessary, however, to point out the systemic consequences of today's decision—if only to confine it and to discourage new experiments with local laws that discriminate against interstate commerce and trade.

The incorrect result the majority reaches; its treatment of the Commerce Clause cases in which our predecessors reached a delicate, sensible implementation of the Framers' original purpose; and the unsatisfactory, brief, circular reasoning contained in the part of the opinion that commands a majority of the Court are all inconsistent with our precedents and require this respectful dissent.

Protectionist trade laws and policies, pursued to favor local interests within a larger trading area, invite prompt retaliatory response. This dynamic was one the Framers understood in theory and saw in fact. See, *e. g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 193, n. 9 (1994). Under the Articles of Confederation the States enacted protectionist laws. It proved difficult and costly, even in terms of political energies, to remove trade barriers by negotiated agreements; and the few resulting compacts seemed destined to favor the more powerful States. The immediate prospect

of escalating trade barriers was real, and a national power to regulate national trade and remove local barriers soon was deemed urgent. Open markets and the elimination of trade barriers were the very concerns that led to the Annapolis Convention of 1786. See, *e. g.*, E. Morgan, The Birth of the Republic, 1763–89, p. 129 (1956). The frustrations of that meeting built a strong consensus for the necessity of a larger compact and led to the call for the Philadelphia Convention. See, *e. g.*, 1 S. Morison, H. Commager, & W. Leuchtenburg, The Growth of the American Republic 244 (rev. 6th ed. 1969). The object of creating free trade throughout a single nation, without protectionist state laws, was a dominant theme of the convention at Philadelphia and during the ratification debates that followed. See, *e. g.*, The Federalist No. 22, pp. 143–144 (C. Rossiter ed. 1961) (A. Hamilton) ("It is indeed evident, on the most superficial view, that there is no object, either as it respects the interest of trade or finance, that more strongly demands a federal superintendence").

This dissent will not repeat an earlier, brief account of our Commerce Clause jurisprudence. See *United States* v. *Lopez*, 514 U. S. 549, 568–583 (1995) (KENNEDY, J., concurring). The cases from *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), to *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829), and then through *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1852), began the elaboration of a rule respectful of local laws and local expertise, while preserving the theory and fact of free trade throughout the Nation. Though an oversimplification, it suffices here to note that our commerce cases have invalidated two types of local barriers: laws that impose unreasonable burdens upon interstate commerce; and laws that discriminate against it.

The doctrine invalidating laws that impose unreasonable burdens upon interstate commerce no doubt has been a deterrent to local enactments attempting to regulate in ways

that restrict a free, national market. The corollary rule that nondiscriminatory laws imposing a reasonable burden are valid allows the States to exercise their powers based on information and expertise more readily available to them than to the National Government. The result is to eliminate the demand and necessity for sweeping national legislation. This line of cases has found occasional detractors. See, *e. g.*, *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 95 (1987) (SCALIA, J., concurring in part and concurring in judgment); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 790–795 (1945) (Black, J., dissenting). The undue burden rule, however, remains an essential safeguard against restrictive laws that might otherwise be in force for decades until Congress can act. Those cases were the background for the formulation used in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), which is in essence ignored by the decision in today's case. See *ante*, at 353–356. The Court's precedents discussing the undue burden principle, and *Pike*, need not be addressed here, however.

That is because the law in question is invalid under a second line of precedents. These cases instruct that laws with either the purpose or the effect of discriminating against interstate commerce to protect local trade are void. These are the authorities relevant to that portion of the opinion that commands a majority, see *ante*, at 341–343, and it is necessary to address the reasons the Court advances in seeking to disregard them.

I

The Court defends the Kentucky law by explaining that it serves a traditional government function and concerns the "cardinal civic responsibilities" of protecting health, safety, and welfare. See *ante*, at 342, and nn. 10–12. This is but a reformulation of the phrase "police power," long abandoned as a mere tautology. It is difficult to identify any state law that has come before us that would not meet the Court's description. That is why, with the unfortunate recent ex-

ception of *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330 (2007), the Court had ceased to view the concept as saying anything instructive. A law may contravene a provision of the Constitution even if enacted for a beneficial purpose.

The police power concept is simply a shorthand way of saying that a State is empowered to enact laws in the absence of constitutional constraints; but, of course, that only restates the question. That a law has the police power label—as all laws do—does not exempt it from Commerce Clause analysis. The Court said this in a case striking down an order, based upon local flood control needs, directing a railroad to remove certain bridges and raise others that supported rail lines involved in interstate commerce: "[A] State cannot avoid the operation of [the Commerce Clause] by simply invoking the convenient apologetics of the police power." *Kansas City Southern R. Co.* v. *Kaw Valley Drainage Dist.*, 233 U. S. 75, 79 (1914) (opinion for the Court by Holmes, J.).

The Court holds the Kentucky law is valid because bond issuance fulfills a governmental function: raising revenue for public projects. See *ante*, at 341–342. Aside from the point that this is but an extension of the police power ("this is a good law") argument, the premise is wrong. The law in question operates on those who hold the bonds and trade them, not those who issue them. The bonds are not issued with a covenant promising tax exemption or tax relief to the holder. The bonds contain no such provision. The security is issued as a formal obligation to repay. Not a word in the terms and conditions of the securities promises favored tax treatment for certain holders. Indeed, that could not be done without impairing marketability. It is simply not commercial or investment practice to make payment obligations turn upon either the residence of the holder or the State of the issuer. The issuer intends to use the interstate market for its bonds and does not encumber them with conditions

giving premiums or penalties depending upon the residence of the holders.

Even if the Court were correct to say the relevant legal framework is bond issuance, not taxation of bonds already issued, its conclusion would be incorrect; for the discrimination against out-of-state commerce still would be too plain and prejudicial to be sustained. See, *e. g.*, *United Haulers*, *supra*, at 369 (ALITO, J., dissenting) ("[T]o the extent [the majority's] holding rests on a distinction between 'traditional' governmental functions and their nontraditional counterparts, it cannot be reconciled with prior precedent" (citation omitted)). The insufficiency of the Court's reasoning is even more apparent, however, because its own premise is incorrect. The challenged state activity is differential taxation, not bond issuance. The state tax provision at issue could be repealed tomorrow without altering or impairing a single obligation in the bonds. It is the tax that matters; and Kentucky gives favored tax treatment to some securities but not others depending solely upon the State of issuance, and it does so to disadvantage bonds from other States.

Our cases establish this rule: A State has no authority to use its taxing power to erect local barriers to out-of-state products or commodities. See, *e. g.*, *West Lynn*, 512 U. S., at 193 ("The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State"). Nothing in our cases even begins to suggest this rule is inapplicable simply because the State uses a discriminatory tax to favor its own enterprise. The tax imposed here is an explicit discrimination against out-of-state issuances for admitted protectionist purposes. It cannot be sustained unless the Court disavows the discrimination principle, one of the most important protections we have elaborated for the Nation's interstate markets.

The Court has ruled that protectionist, differential taxation with respect to securities sales is invalid. *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977). In that case the Court considered the validity of a New York transfer tax on securities transactions. New York taxed out-of-state sales more heavily than in-state sales. The transactions in question were concluded on stock exchanges, such as the Boston Stock Exchange, located outside New York State. All conceded the transactions had sufficient contacts with New York so it could impose a tax; the question was the validity of a higher rate on transactions closed on exchanges located out of State. The Court's unanimous opinion held that the discriminatory tax, designed to favor New York, was invalid. *Id.*, at 328. "[I]n the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.*, at 337.

The same was true of the discriminatory tax exemption in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), which the Court invalidated after observing that "as long as there is some competition between the locally produced exempt products and nonexempt products from outside the State, there is a discriminatory effect." *Id.*, at 271. This principle refutes the majority's contention, see *ante*, at 342–343, that Kentucky's bonds do not compete with other state or local government bonds. The relevant inquiry is not the purpose of a bond but whether the bond is a product that competes. The majority cannot establish that, from an investor's standpoint, Kentucky's bonds do not compete with bonds from other state or municipal governments. Indeed, that competition is why the bonds need the advantages the exemptions give them. Nothing in *Bacchus* suggested its holding was dependent upon the private nature of the favored competitors. Instead, in rejecting the argument that discriminatory taxation was justified because the goal was to promote local industry, the Court explained that the "determination

of constitutionality" does not depend upon "the benefited or the burdened party." 468 U. S., at 273. This reasoning does not permit a different outcome when the State is the "benefited party."

The Court had little difficulty in holding invalid a discriminatory tax in *Fulton Corp.* v. *Faulkner*, 516 U. S. 325 (1996). There North Carolina had devised a tax on intangibles that employed a deduction scheme favoring those who owned stock in local companies by, in effect, taxing at a higher rate those who owned stock in out-of-state companies. *Id.*, at 327–328. The *Fulton* scheme favored "domestic corporations over their foreign competitors in raising capital among North Carolina residents and tend[ed], at least, to discourage domestic corporations from plying their trades in interstate commerce." *Id.*, at 333. The Court held the scheme invalid as contrary to the Commerce Clause. See *id.*, at 347.

Differential taxation favoring local trade over interstate commerce poses serious threats to the national free market because the taxing power is at once so flexible and so potent. The Court's differential tax cases are mentioned here at the outset because taxation is the issue; and discriminatory tax schemes are relatively rare, if only because they resemble tariffs—the "paradigmatic . . . law[s] discriminating against interstate commerce," *West Lynn*, 512 U. S., at 193. See *ibid.* ("[T]ariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means").

The precedents forbidding discriminatory taxes are a subset of a larger class of cases that invalidate other regulations that favor local interests. These cases, too, are inconsistent with the Court's holding today. Bonds are commodities in interstate commerce, and in this respect consumers are entitled to choose them over local products just as with milk, *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951); apples, *Hunt*

v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333 (1977); solid waste for landfill, *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. 353 (1992); solid waste for transfer, *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383 (1994); out-of-state waste, *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978); and ethanol, *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269 (1988) (a differential tax case). Cases on export controls—though of less relevance here—provide further instruction for the simple proposition that the national market cannot be isolated for protectionist or local purposes. See, *e. g.*, *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (striking down a state law prohibiting the shipment of minnows out of State); *New England Power Co.* v. *New Hampshire*, 455 U. S. 331 (1982) (striking down a state law requiring the state utility commission's permission before a utility could convey electricity out of State).

In that portion of the Court's opinion that commands a majority the main point is that validation of Kentucky's tax exemption follows from the Court's opinion last Term in *United Haulers*. But that overlooks the argument that was central to the entire holding of *United Haulers*. There the Court concluded the ordinance applied equally to interstate and in-state commerce—and so it applied without differentiation between in-state and out-of-state commerce—because the government had monopolized the waste processing industry. See 550 U. S., at 334. Nondiscrimination, not just state involvement, was central to the rationale. That justification cannot be invoked here, for discrimination against out-of-state bonds is the whole purpose of the law in question. Kentucky has not monopolized the bond market or the municipal bond market. Kentucky has entered a competitive, nonmonopolized market and, to give its bonds a market advantage, has taxed out-of-state municipal bonds at a higher rate. The explicit rationale of the law is to differentiate between local and interstate commodities. This case

is not an extension of *United Haulers;* it is a rejection of its principal rationale—that in monopolizing the local market, the ordinance applied equally to interstate and local commerce.

The Court's next argument is the police power argument, returning to the idea that revenue-raising is important for a State's own essential projects. See *ante*, at 341–342. This argument has two major flaws. First, it is a replay of the circularity inherent in the police powers, health, safety, and welfare rhetoric. It is difficult to think of any law meeting with general approval that, assuming its validity in other respects, would fall outside the description that it is for the health, safety, and welfare of its citizens. Second, the argument ignores the fact that all protectionist laws, by definition, can be justified to further some local interest.

In a case with important parallels to this one the Court considered whether a property tax exemption available to charitable and benevolent organizations in Maine could have differential application in order to advantage camps that served primarily Maine residents as distinct from camps that served primarily out-of-state residents. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564 (1997). The Court was explicit in rejecting the argument that profit and not-for-profit organizations should be treated differently with respect to Commerce Clause protection, *id.*, at 584, despite the State's special, historic concern for charitable assistance within its own borders. The *Camps Newfound* analysis is applicable here: There is "no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause." *Ibid.* So, too, there is no reason the governmental character of the bond-issuing enterprise should exclude it from the coverage of the Commerce Clause.

The majority concludes its central framework by saying the market for Kentucky's bonds is not similar to the market

for private issuers because it is the Commonwealth's own discrete market. So, it says, Kentucky can discriminate if it chooses. Quite apart from the principle that discrimination in explicit terms, purpose, and effect should invalidate this law, the Court's argument proceeds, again, from a wrong and circular premise. The argument that Kentucky bonds are in a discrete market has no basis in the record. Kentucky state and local bonds compete with other bonds, as any investor knows. Within the national bond market there is a discrete submarket for all state and municipal bonds because they are tax exempt under the Internal Revenue Code. See *ante*, at 332 (citing 26 U. S. C. § 103(a)). The Court, however, goes on to suggest that within this separate market there are 41 further discrete markets for bonds in each of the separate States that have laws like the one before the Court. *Ante*, at 342–343. This is wrong because it defines the market based upon sellers' purposes rather than upon its investors' purposes. The latter are the touchstone of market definition. The Court's seller-based definition is at odds with our Commerce Clause jurisprudence. The question has never been what the beneficiary of the discriminatory law will do with that benefit; that question relates to the ends sought by the discriminatory means. See, *e. g.*, *Bacchus*, 468 U. S., at 272–273; see also *United Haulers*, *supra*, at 366–367 (ALITO, J., dissenting).

The issue in this case, then, cannot be resolved by determining what the issuer does with the proceeds. And to the extent the Court says there is a consumer preference for a State's own bonds within its own borders, this makes the mistake of defining a market by first assuming the validity of the discriminatory law at issue. No precedent permits the Court to define a market in terms of the very law under challenge for protectionist purposes and effects. This double counting does not work. If the discriminatory barrier did not exist, then the national market for all state and mu-

nicipal bonds would operate like other free, nationwide markets. The fact that the national market for tax-free state and municipal bonds is a discrete one serves only to reinforce the point that it should operate without local restriction.

That the people in each of 49 States that joined a brief in support of Kentucky are alleged to want the law is irrelevant. See *ante*, at 350. Protectionist interests always want the laws they pass, even if their fellow citizens bear the burden, for they are positioned to profit from the barrier. The circumstance that the residents choose to bear the costs of a protectionist measure (assuming this to be so even though entrenched interests are the usual source for the law) has been found by this Court to be quite irrelevant: "This argument, if accepted, would undermine almost every discriminatory tax case. State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional." *West Lynn*, 512 U. S., at 203; see also *Bacchus*, *supra*, at 272.

That 41 States have local protectionist laws similar to this one proves the necessity of allowing settled principles against discrimination to operate in an important national market. The Court seems proud to say that New York was the first to enact a protectionist exemption. See *ante*, at 335. That, too, simply underscores the importance of adhering to the rules against state trade discrimination. New York, as a great financial capital, likely had no trouble raising money for its own bonds, and so its exemption might have been thought to be an advantage in some respects. The exemption benefits wealthy, high-tax States, allowing those States to hoard capital that otherwise might travel to issuers who offer a more competitive deal in pretax dollars. See, *e. g.*, Blumstein, Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds, 31 Vand. L. Rev. 473, 546 (1978).

In the wake of one trade barrier, retaliatory measures follow, as the Framers well knew. The widespread nature of these particular trade barriers illustrates the standard dynamics of politics and economics, demonstrating once more the need to avoid validating this law as somehow in the States' own interests. By misapplying the rationales of the controlling precedents, the Court invites further erosion of the Commerce Clause, which must remain as a deterrent to experiments designed to serve local interests at the expense of a national system.

The Court's categorical approach would seem to allow States to discriminate against out-of-state, government bonds in other ways. Nothing in the Court's rationale justifying this scheme would stop Kentucky from taxing interest on out-of-state bonds at a high rate, say 80%, simply to give its own bonds further advantage. High tax rates designed to make out-of-state interests less attractive are not unheard of in our cases. See, *e. g.*, *Fulton*, 516 U. S., at 333. Today the Court upholds a scheme no different in kind from those patently unconstitutional schemes. Furthermore, the Court's approach would permit a State to condition tax-free treatment of out-of-state bonds on reciprocal treatment in another State, see *ante*, at 335–336, n. 7 (citing, for example, Utah's reciprocal tax-free treatment of States that do not tax Utah bonds), leading to the discrete market blocs the Constitution was designed to eliminate. These examples underscore the objections already noted.

II

In a part of the opinion joined only by a plurality the analysis concludes the differential taxation scheme is a sufficiently diluted regulatory scheme so that the market-participant exception applies. See *ante*, at 343–348. This needs little comment. It suffices to note that a "tax exemption is not the sort of direct state involvement in the market

that falls within the market-participation doctrine." *Camps Newfound*, 520 U. S., at 593. This expansion of the market-participant exception, if it were unleashed by a majority of the Court, would be an open invitation to enact these kinds of discriminatory laws—laws that, until today, the Court has not upheld in even a single instance. Taxation is a quintessential act of regulation, not market participation. See, *e. g.*, *New Energy*, 486 U. S., at 278 ("[I]t [is] clear that Ohio's assessment and computation of its fuel sales tax, regardless of whether it produces a subsidy, cannot plausibly be analogized to the activity of a private purchaser"). And even in a case where a State is a paradigmatic market participant because it owns the asset itself, downstream restrictions that discriminate against interstate commerce are not permitted. See *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 98 (1984) (plurality opinion) ("[A]lthough the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant").

III

Throughout the Court's argument is the concern that, were this law to be invalidated, the national market for bonds would be disrupted. See *ante*, at 353–356. The concern is legitimate, but if it is to be the controlling rationale the Court should cast its decision in those terms. The Court could say there needs to be a *sui generis* exception, noting that the interstate discrimination has been entrenched in many States and for a considerable time. That rationale would prompt my own statement of disagreement as a matter of principle and economic consequences, but it would be preferable to a decision that misinterprets the Court's precedents. Instead, today the Court weakens the preventative force of the Commerce Clause and invites other protectionist laws, thus risking further dislocations and market ineffi-

ciencies based on the origin of products and commodities that should be traded nationwide and without local trade barriers.

For these reasons, in my view, the judgment of the Court of Appeals of Kentucky should be affirmed.

JUSTICE ALITO, dissenting.

I proceed in this case, as I did in *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 356 (2007) (dissenting opinion), on the assumption that the Court's established dormant Commerce Clause precedents should be followed, and on that assumption, I entirely agree with and join JUSTICE KENNEDY's dissent.

Syllabus

UNITED STATES *v.* RODRIQUEZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–1646. Argued January 15, 2008—Decided May 19, 2008

Upon respondent's federal conviction for possession of a firearm by a convicted felon, 18 U. S. C. §922(g)(1), he had three prior Washington state convictions for delivery of a controlled substance. At the time of those convictions, Washington law specified a maximum 5-year prison term for the first such offense. A recidivist provision, however, set a 10-year ceiling for a second or subsequent offense, and the state court had sentenced respondent to concurrent 48-month sentences on each count. The Government contended in the federal felon-in-possession case that respondent should be sentenced under the Armed Career Criminal Act (ACCA), §924(e), which sets a 15-year minimum sentence "[i]n the case of a person who violates [§922(g)] and has three previous convictions . . . for a . . . serious drug offense," §924(e)(1). Because a state drug-trafficking conviction qualifies as "a serious drug offense" if "a maximum term of imprisonment of ten years or more is prescribed by law" for the "offense," §924(e)(2)(A)(ii), and the maximum term on at least two of respondent's Washington crimes was 10 years under the state recidivist provision, the Government argued that these convictions had to be counted under ACCA. The District Court disagreed, holding that the "maximum term of imprisonment" for §924(e)(2)(A)(ii) purposes is determined without reference to recidivist enhancements. The Ninth Circuit affirmed.

Held: The "maximum term of imprisonment . . . prescribed by law" for the state drug convictions at issue was the 10-year maximum set by the applicable state recidivist provision. Pp. 382–393.

(a) This reading is compelled by a straightforward application of §924(e)(2)(A)(ii)'s three key terms: "offense," "law," and "maximum term." The "offense" was the crime charged in each of respondent's drug-delivery cases. And because the relevant "law" is the state statutes prescribing 5- and 10-year prison terms, the "maximum term" prescribed for at least two of respondent's state drug offenses was 10 years. The Ninth Circuit's holding that the maximum term was 5 years contorts ACCA's plain terms. Although the state court sentenced respondent to 48 months, there is no dispute that state law permitted a sentence of up to 10 years. The Circuit's interpretation is also inconsistent with

how the concept "maximum term of imprisonment" is customarily understood by participants in the criminal justice process. Pp. 382–384.

(b) Respondent's textual argument—that because "offense" generally describes a crime's elements, while prior convictions required for recidivist enhancements are not typically elements, such convictions are not part of the ACCA "offense," and the "maximum term" for the convictions at issue was the 5-year ceiling for simply committing the drug offense elements—is not faithful to the statutory text, which refers to the maximum 10-year term prescribed by Washington law for each of respondent's two relevant offenses. Respondent's "manifest purpose" argument—that because ACCA uses the maximum state-law penalty as shorthand for conduct sufficiently serious to trigger the mandatory penalty, while an offense's seriousness is typically gauged by the nature of the defendant's conduct, the offense's elements, and the crime's impact, a defendant's recidivist status has no connection to whether his offense was serious—rests on the erroneous proposition that a prior record has no bearing on an offense's seriousness. Respondent's understanding of recidivism statutes has been squarely rejected. See, *e. g.*, *Nichols* v. *United States*, 511 U. S. 738, 747. Pp. 384–386.

(c) Respondent's argument that the Court's ACCA interpretation produces a perverse bootstrapping whereby a defendant is punished under federal law for being treated as a recidivist under state law is rejected. The Court's reading is bolstered by the fact that ACCA is itself a recidivist statute, so that Congress must have understood that the "maximum penalty prescribed by [state] law" could be increased by state recidivism provisions. Contrary to respondent's suggestion, *United States* v. *LaBonte*, 520 U. S. 751—in which the Court held that the phrase "maximum term authorized" in 28 U. S. C. §994(h) "refers to all applicable statutes," including recidivist enhancements—supports the Court's ACCA interpretation. Respondent's reliance on *Taylor* v. *United States*, 495 U. S. 575, is also misplaced: There is no connection between the issue there (the meaning of "burglary" in §924(e)(2)(B)(ii)) and the meaning of "maximum term of imprisonment . . . prescribed by law" in §924(e)(2)(A)(ii). Respondent argues unpersuasively that, under today's interpretation, offenses that are not really serious will be included as "serious drug offense[s]" because of recidivist enhancements. Since Congress presumably thought that state lawmakers must consider a crime "serious" when they provide a 10-year sentence for it, this Court's holding poses no risk that a drug-trafficking offense will be treated as "serious" without satisfying the standard Congress prescribed. Pp. 386–388.

(d) Also rejected is respondent's argument that the Court's holding will often require federal courts to engage in difficult inquiries regard-

Syllabus

ing novel state-law questions and complex factual determinations about long-past state-court proceedings. Respondent greatly exaggerates the difficulties because (1) receipt of a recidivist enhancement will necessarily be evident from the sentence's length in some cases; (2) the conviction judgment will sometimes list the maximum possible sentence even where the sentence actually imposed did not exceed the top sentence allowed without recidivist enhancement; (3) some jurisdictions require the prosecution to submit a publicly available charging document to obtain a recidivist enhancement; (4) a plea colloquy will often include a statement by the trial judge regarding the maximum penalty; and (5) where the records do not show that the defendant faced a recidivist enhancement, the Government may well be precluded from establishing that a conviction was for a qualifying offense. Merely because future cases might present difficulties cannot justify disregarding ACCA's clear meaning. Pp. 388–389.

(c) Also unavailing is respondent's argument that if recidivist enhancements can increase the "maximum term" under ACCA, then mandatory guidelines systems capping sentences can decrease the "maximum term," whereas Congress cannot have wanted to make the "maximum term" dependent on the complexities of state sentencing guidelines. The phrase "maximum term of imprisonment . . . prescribed by law" for the "offense" could not have been meant to apply to the top sentence in a guidelines range because (1) such a sentence is generally not really the maximum because guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances; and (2) in all of the many statutes predating ACCA and the federal Sentencing Reform Act of 1984 that used the concept of the "maximum" term prescribed by law, the concept necessarily referred to the maximum term prescribed by the relevant criminal statute, not the top of a sentencing guidelines range. *United States* v. *R. L. C.*, 503 U. S. 291, 295, n. 1, 299, distinguished. Pp. 390–393.

464 F. 3d 1072, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 393.

Kannon K. Shanmugam argued the cause for the United States. With him on the briefs were *Solicitor General*

Clement, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Daniel S. Goodman*.

Charles A. Rothfeld argued the cause for respondent. With him on the brief were *Andrew J. Pincus*, *Dan M. Kahan*, and *L. Cece Glenn*.*

JUSTICE ALITO delivered the opinion of the Court.

Under the Armed Career Criminal Act (ACCA), 18 U. S. C. §924(e)(2)(A)(ii), a state drug-trafficking conviction qualifies as "a serious drug offense" if "a maximum term of imprisonment of ten years or more is prescribed by law" for the "offense." The Court of Appeals for the Ninth Circuit held that "the maximum term of imprisonment . . . prescribed by law" must be determined without taking recidivist enhancements into account. 464 F. 3d 1072, 1082 (2006). We reverse.

I

At issue in this case is respondent's sentence on his 2004 conviction in the United States District Court for the Eastern District of Washington for possession of a firearm by a convicted felon, in violation of 18 U. S. C. §922(g)(1). Respondent had two prior state convictions in California for residential burglary and three state convictions in Washington for delivery of a controlled substance, in violation of Wash. Rev. Code §§69.50.401(a)(1)(ii)–(iv) (1994).[1] Respondent's three Washington drug convictions occurred on the same day but were based on deliveries that took place on three separate dates. Sentencing Order in No. CR–03–142–

*Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Jeffrey L. Fisher* and *Thomas W. Hillier II*; and for Professors of Criminal Law by *Meir Feder*, *Donald B. Ayer*, and *Samuel Estreicher*.

[1] "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance." Wash. Rev. Code §69.50.401(a) (1994).

RHW (ED Wash., Sept. 3, 2004), p. 5, App. 245, 250 (hereinafter Sentencing Order). At the time of respondent's drug offenses, the Washington statute that respondent was convicted of violating stated that, upon conviction, a defendant could be "imprisoned for not more than five years," §§69.50.401(a)(1)(ii)–(iv), but another provision specified that "[a]ny person convicted of a second or subsequent offense" could "be imprisoned for a term up to twice the term otherwise authorized," §69.50.408(a). Thus, by virtue of this latter, recidivist, provision respondent faced a maximum penalty of imprisonment for 10 years. The judgment of conviction for each of the drug-delivery charges listed the maximum term of imprisonment for the offense as "ten years," App. 16, 42, 93, but the state court sentenced respondent to concurrent sentences of 48 months' imprisonment on each count, *id.*, at 21, 47, 98.

In the federal felon-in-possession case, the Government asked the District Court to sentence respondent under ACCA, which sets a 15-year minimum sentence "[i]n the case of a person who violates section 922(g) of [Title 18] and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another . . . ." 18 U. S. C. §924(e)(1) (2000 ed., Supp. V). The Government argued that respondent's two prior California burglary convictions were for "'violent felonies.'" Pet. for Cert. 4. See §924(e)(2)(B)(ii) (2000 ed.) (listing "burglary" as a "violent felony"). The District Court agreed, and that ruling is not at issue here.

The Government also argued that at least two of respondent's Washington drug convictions were for "serious drug offense[s]." Under ACCA, a "serious drug offense" includes:

> "an offense under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U. S. C. 802)), *for which*

> *a maximum term of imprisonment of ten years or more is prescribed by law.*" § 924(e)(2)(A)(ii) (emphasis added).

Because the maximum term that respondent faced on at least two of the Washington charges was 10 years, the Government contended that these convictions had to be counted under ACCA. The District Court disagreed, holding that respondent's drug-trafficking convictions were not convictions for "serious drug offense[s]" under ACCA because the "maximum term of imprisonment" for the purposes of § 924(e)(2)(A)(ii) is determined without reference to recidivist enhancements. Sentencing Order, at 9, App. 254.

The Court of Appeals for the Ninth Circuit, applying its prior precedent in *United States* v. *Corona-Sanchez*, 291 F. 3d 1201 (2002) (en banc), affirmed. 464 F. 3d 1072. The court recognized that its decision conflicted with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F. 3d 467, 469–470, cert. denied, 543 U. S. 967 (2004), and was "in tension" with decisions of the Fourth and Fifth Circuits. 464 F. 3d, at 1082, n. 6; see *Mutascu* v. *Gonzales*, 444 F. 3d 710, 712 (CA5 2006) *(per curiam)*; *United States* v. *Williams*, 326 F. 3d 535, 539 (CA4 2003). We granted the Government's petition for a writ of certiorari, 551 U. S. 1191 (2007).

II

The question that we must decide is whether the "maximum term of imprisonment prescribed by law" in this case is, as respondent maintains and the Ninth Circuit held, the 5-year ceiling for first offenses or, as the Government contends, the 10-year ceiling for second or subsequent offenses. See Wash. Rev. Code §§ 69.50.401(a)(1)(ii)–(iv), 69.50.408(a).

The Government's reading is compelled by the language of ACCA. For present purposes, there are three key statutory terms: "offense," "law," and "maximum term." The "offense" in each of the drug-delivery cases was a violation of §§ 69.50.401(a)(1)(ii)–(iv). The relevant "law" is set out in

both that provision, which prescribes a "maximum term" of 5 years for a first "offense," and § 69.50.408(a), which prescribes a "maximum term" of 10 years for a second or subsequent "offense." Thus, in this case, the maximum term prescribed by Washington law for at least two of respondent's state drug offenses was 10 years.

The Ninth Circuit's holding that the maximum term was five years contorts ACCA's plain terms. Although the Washington state court sentenced respondent to 48 months' imprisonment, there is no dispute that § 69.50.408(a) permitted a sentence of up to 10 years. On the Ninth Circuit's reading of ACCA, even if respondent had been sentenced to, say, six years' imprisonment, "the maximum term of imprisonment" prescribed by law still would have been five years. It is hard to accept the proposition that a defendant may lawfully be sentenced to a term of imprisonment that exceeds the "maximum term of imprisonment . . . prescribed by law," but that is where the Ninth Circuit's reading of the statute leads.

The Ninth Circuit's interpretation is also inconsistent with the way in which the concept of the "maximum term of imprisonment" is customarily understood by participants in the criminal justice process. Suppose that a defendant who indisputably had more than three prior convictions for "violent felon[ies]" or "serious drug offense[s]" was charged in federal court with violating the felon-in-possession statute. Under ACCA, this defendant would face a sentence of "not less than 15 years." 18 U. S. C. § 924(e)(1) (2000 ed., Supp. V). Suppose that the defendant asked his or her attorney, "What's the maximum term I face for the new offense?" An attorney aware of ACCA would surely not respond, "10 years," even though 10 years is the maximum sentence without the ACCA enhancement. See § 924(a)(2) (2000 ed.).

Suppose that the defendant then pleaded guilty to the felon-in-possession charge. Under Federal Rule of Criminal Procedure 11(b)(1)(H), the trial judge would be required to

advise the defendant of the "maximum possible penalty." If the judge told the defendant that the maximum possible sentence was 10 years and then imposed a sentence of 15 years based on ACCA, the defendant would have been sorely misled and would have a ground for moving to withdraw the plea. See *United States* v. *Gonzalez*, 420 F. 3d 111, 132 (CA2 2005); *United States* v. *Harrington*, 354 F. 3d 178, 185–186 (CA2 2004). In sum, a straightforward application of the language of ACCA leads to the conclusion that the "maximum term of imprisonment prescribed by law" in this case was 10 years.

III

A

In an effort to defend the Ninth Circuit's decision, respondent offers both a textual argument and a related argument based on the "manifest purpose" of ACCA. Brief for Respondent 8.

Respondent's textual argument is as follows. The term "offense" "generally is understood to describe the elements constituting the crime." *Id.*, at 10. Because prior convictions required for recidivist enhancements are not typically offense elements, they should not be considered part of the "offense" under ACCA. Thus, the "maximum term of imprisonment prescribed by law" for the drug convictions at issue was the maximum term prescribed for simply committing the elements of the drug offense and was therefore five years. *Id.*, at 10–11.

Respondent's argument is not faithful to the statutory text. Respondent reads ACCA as referring to "the maximum term of imprisonment prescribed by law" for a defendant *with no prior convictions that trigger a recidivist enhancement*, but that is not what ACCA says. ACCA instead refers to "the maximum term of imprisonment prescribed by law" for "an offense," and, as previously explained, in this case, the maximum term prescribed by Washington law for each of respondent's two relevant offenses was 10 years.

Respondent's argument based on ACCA's "manifest purpose" must also be rejected. Respondent argues that ACCA uses "the maximum penalty specified for the offense by state law as a short-hand means of identifying conduct deemed sufficiently 'serious' to trigger [the] mandatory penalty." *Id.*, at 9. According to respondent, "[t]he nature of [a defendant's] conduct, the elements of the offense, and the impact of the crime . . . are the characteristics that typically are used to gauge the 'seriousness' of an offense," and a defendant's "status as a recidivist has no connection to whether the offense committed by the defendant was a 'serious' one." *Id.*, at 11.

This argument rests on the erroneous proposition that a defendant's prior record of convictions has no bearing on the seriousness of an offense. On the contrary, however, an offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit greater punishment. Similarly, a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation. See *Witte* v. *United States*, 515 U. S. 389, 403 (1995); *Spencer* v. *Texas*, 385 U. S. 554, 570 (1967) (Warren, C. J., dissenting in two judgments and concurring in one).

If respondent were correct that a defendant's record of prior convictions has no bearing on the seriousness of an offense, then it would follow that any increased punishment imposed under a recidivist provision would not be based on the offense of conviction but on something else—presumably the defendant's prior crimes or the defendant's "status as a recidivist," Brief for Respondent 11. But we have squarely rejected this understanding of recidivism statutes. In *Nichols* v. *United States*, 511 U. S. 738 (1994), we explained that "'[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant.'" *Id.*, at 747 (quoting *Baldasar* v. *Illinois*, 446

U. S. 222, 232 (1980) (Powell, J., dissenting)). When a defendant is given a higher sentence under a recidivism statute—or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history—100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's "status as a recidivist." The sentence "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948).

B

Respondent argues that our interpretation of ACCA produces "a sort of perverse bootstrapping" under which a defendant is "punished under federal law for being treated as a recidivist under state law," Brief for Respondent 20 (emphasis deleted), but the fact that ACCA is itself a recidivist statute bolsters our reading. Since ACCA is a recidivist statute, Congress must have had such provisions in mind and must have understood that the "maximum penalty prescribed by [state] law" in some cases would be increased by state recidivism provisions.

Contrary to respondent's suggestion, *United States* v. *LaBonte*, 520 U. S. 751 (1997), supports our interpretation of ACCA. The statute at issue in *LaBonte*, a provision of the Sentencing Reform Act of 1984, as amended, 28 U. S. C. §994(h), directed the United States Sentencing Commission to "assure" that the Sentencing Guidelines specify a prison sentence "at or near the maximum term authorized for categories of" adult offenders who commit their third felony drug offense or violent crime. We held that the phrase "maximum term authorized" "refers to all applicable statutes," including recidivist enhancements. 520 U. S., at 758, n. 4.

Respondent claims that *LaBonte* supports his position because ACCA, unlike 28 U. S. C. §994(h), does not refer to

"categories of" offenders. Respondent suggests that Congress' failure to include such language in ACCA means that Congress intended to refer to a "maximum term" that does not depend on whether a defendant falls into the first-time-offender or recidivist "category." Respondent does not explain how 18 U. S. C. §924(e)(2)(A) could have easily been reworded to mirror 28 U. S. C. §994(h). But in any event, the language used in ACCA, for the reasons explained above, is more than clear enough.

Respondent argues that the Ninth Circuit's decision is supported by the so-called "categorical" approach that we used in *Taylor* v. *United States*, 495 U. S. 575 (1990), in determining which offenses qualify as "violent felon[ies]" under 18 U. S. C. §924(e)(2)(B)(ii). Section 924(e)(2)(B)(ii) provides that four enumerated crimes—burglary, arson, extortion, and offenses involving the use of explosives—are "violent felon[ies]" for ACCA purposes. In *Taylor*, we held that Congress intended for these crimes to have a "uniform definition" that was "independent of the labels employed by the various States' criminal codes." 495 U. S., at 592. According to respondent, "[t]he categorical approach rests on the congressional intent—reflected in the statutory language—to focus the ACCA inquiry on the offense of conviction, rather than on collateral matters unrelated to the definition of the crime." Brief for Respondent 12.

We see no connection, however, between the issue in *Taylor* (the meaning of the term "burglary" in §924(e)(2)(B)(ii)) and the issue here (the meaning of the phrase "maximum term of imprisonment . . . prescribed by law" under §924(e)(2)(A)(ii)). *Taylor* held that the meaning of "burglary" for purposes of ACCA does not depend on the label attached by the law of a particular State, 495 U. S., at 600–601, but the "maximum penalty prescribed by law" for a state offense necessarily depends on state law.

For a similar reason, we reject respondent's argument that, under our interpretation, offenses that are not really

serious will be included as "serious drug offense[s]" because of recidivist enhancements. In §924(e)(2)(A)(ii), Congress chose to rely on the "maximum term of imprisonment . . . prescribed" by state law as the measure of the seriousness of state offenses involving the manufacture, distribution, or possession of illegal drugs. Congress presumably thought—not without reason—that if state lawmakers provide that a crime is punishable by 10 years' imprisonment, the lawmakers must regard the crime as "serious," and Congress chose to defer to the state lawmakers' judgment. Therefore, our interpretation poses no risk that a drug-trafficking offense will be treated as "serious" without satisfying the standard that Congress prescribed.[2]

C

Respondent argues that it will often be difficult to determine whether a defendant faced the possibility of a recidivist enhancement in connection with a past state drug conviction and that therefore our interpretation of ACCA will require the federal courts to "engage in difficult inquiries regarding novel questions of state law and complex factual determinations about long-past proceedings in state courts." Brief for Respondent 21. Respondent greatly exaggerates the problems to which he refers.

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[2] In any event, the only "minor drug crime" that respondent identifies as potentially constituting an ACCA predicate based on recidivist enhancement is distribution of a 21 U. S. C. §812, Schedule III narcotic in violation of Mich. Comp. Laws Ann. §333.7401(2)(b)(*ii*) (West Supp. 2007). Given that Schedule III substances include anabolic steroids and painkillers with specified amounts of certain narcotics like opium, see 21 U. S. C. §812, one might debate respondent's assertion that distribution of these narcotics is not "serious" in the generic sense of the word. However, Congress chose to defer to the Michigan Legislature's judgment that the offense was "serious" enough to warrant punishment of first offenses by up to seven years' imprisonment, and certain repeat offenses by a maximum term of life imprisonment. See Mich. Comp. Laws Ann. §§333.7401(2)(b)(*ii*), 333.769.12(1).

First, in some cases, a defendant will have received a recidivist enhancement, and this will necessarily be evident from the length of the sentence imposed. Second, as the present case illustrates, see App. 16, 42, 93, the judgment of conviction will sometimes list the maximum possible sentence even where the sentence that was imposed did not exceed the top sentence allowed without any recidivist enhancement. Third, as respondent himself notes, some jurisdictions require that the prosecution submit a formal charging document in order to obtain a recidivist enhancement. See Brief for Respondent 33. Such documents fall within the limited list of generally available documents that courts already consult for the purpose of determining if a past conviction qualifies as an ACCA predicate. See *Shepard* v. *United States*, 544 U. S. 13, 20 (2005). Fourth, in those cases in which the defendant pleaded guilty to the state drug charges, the plea colloquy will very often include a statement by the trial judge regarding the maximum penalty. This is mandated by Federal Rule of Criminal Procedure 11(b)(1)(H), and many States have similar requirements.[3] Finally, in those cases in which the records that may properly be consulted do not show that the defendant faced the possibility of a recidivist enhancement, it may well be that the Government will be precluded from establishing that a conviction was for a qualifying offense. The mere possibility that some future cases might present difficulties cannot justify a reading of ACCA that disregards the clear meaning of the statutory language.

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[3]See, *e. g.*, Kan. Stat. Ann. §22–3210(a)(2) (2007); N. C. Gen. Stat. Ann. §15A–1022(a)(6) (Lexis 2007); Tex. Code Crim. Proc. Ann., Art. 26.13(a)(1), (d) (Vernon Supp. 2007); Ala. Rule Crim. Proc. 14.4(a)(1)(ii) (Lexis 2007); Fla. Rules Crim. Proc. 3.172(b), (c)(1) (West 2007); Ga. Uniform Super. Ct. Rule 33.8(C)(3) (Lexis 2008); Ill. Sup. Ct. Rule 402(a)(2) (West 2007); Pa. Rule Crim. Proc. 590, *comment* (West 2008); Ohio Rule Crim. Proc. 11(C)(2)(a) (West 2008); Mich. Rule Crim. Proc. 6.302(B)(2) (West 2007); *Alexander* v. *State*, 605 So. 2d 1170, 1172 (Miss. 1992); *Bunnell* v. *Superior Court*, 13 Cal. 3d 592, 604–605, 531 P. 2d 1086, 1094 (1975).

D

Respondent's last argument is that if recidivist enhancements can increase the "maximum term" of imprisonment under ACCA, it must follow that mandatory guidelines systems that cap sentences can decrease the "maximum term" of imprisonment. Brief for Respondent 38. In each situation, respondent argues, the "maximum term" of imprisonment is the term to which the state court could actually have sentenced the defendant. Respondent concedes that he has waived this argument with respect to his own specific state-court convictions. See Brief in Opposition 15, n. 7. He argues, however, that Congress cannot have wanted to make the "maximum term" of imprisonment for ACCA purposes dependent on the complexities of state sentencing guidelines. We conclude, however, that the phrase "maximum term of imprisonment . . . prescribed by law" for the "offense" was not meant to apply to the top sentence in a guidelines range.

First, the top sentence in a guidelines range is generally not really the "maximum term . . . prescribed by law" for the "offense" because guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances. The United States Sentencing Guidelines, for example, permit "upward departures," see United States Sentencing Commission, Guidelines Manual §5K2.0 (Nov. 2007), and essentially the same characteristic was shared by all of the mandatory guidelines systems in existence at the time of the enactment of the ACCA provision at issue in this case.[4]

[4] By 1986, when Congress added the relevant statutory language, see Pub. L. 99–570, §1402, 100 Stat. 3207–39, eight States had guidelines systems in effect. See Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196, Table 1 (2005). Two of those States (Utah and Maryland) had voluntary guidelines, *id.*, at 1198, and the other six States had guidelines systems that allowed for sentences in excess of the recommended range in various cir-

(Following this pattern, Washington law likewise provided at the time of respondent's state convictions that a sentencing judge could "impose a sentence outside the standard sentence range" upon a finding "that there [were] substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code §9.94A.120(2) (1994).[5])

Second, the concept of the "maximum" term of imprisonment or sentence prescribed by law was used in many statutes that predated the enactment of ACCA and the federal Sentencing Reform Act of 1984, Pub. L. 98–473, §211, 98 Stat. 1987, and in all those statutes the concept necessarily referred to the maximum term prescribed by the relevant criminal statute, not the top of a sentencing guidelines range. See, *e. g.*, 18 U. S. C. §3 (1982 ed.) ("[A]n accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment . . . for the punishment of the principal"); §3575(b) (allowing for an increased sentence for dangerous special offenders "not disproportionate in severity to the maximum term otherwise authorized by law for" the underlying felony); see also §371 (the punishment for conspiracy to commit a misdemeanor "shall not exceed the maximum punishment provided for such misdemeanor"); §3651 (allowing for confinement and suspension of sentence upon conviction of an offense not punishable by death or life imprisonment "if the maximum sentence for such offense is

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cumstances, see *People* v. *Miles*, 156 Mich. App. 431, 437, 402 N. W. 2d 34, 37 (1986) (remanding for the trial court to state reasons for upward departure); *Staats* v. *State*, 717 P. 2d 413, 422 (Alaska App. 1986) (affirming upward departure); *State* v. *Armstrong*, 106 Wash. 2d 547, 549–550, 723 P. 2d 1111, 1113–1114 (1986) (en banc) (same); *State* v. *Mortland*, 395 N. W. 2d 469, 474 (Minn. App. 1986) (same); *Walker* v. *State*, 496 So. 2d 220 (Fla. App. 1986) *(per curiam)* (same); *Commonwealth* v. *Mills*, 344 Pa. Super. 200, 204, 496 A. 2d 752, 754 (1985) (same).

[5] While Washington law provided a list of "illustrative factors which the court [could] consider in the exercise of its discretion to impose an exceptional sentence," the list was "not intended to be exclusive" of other potential reasons for departing. §9.94A.390.

more than six months"); §3653 (referring to the "maximum probation period").

It is instructive that, even in the Sentencing Reform Act, the concept of the "maximum term of imprisonment" prescribed for an offense was used in this sense. See §212, 98 Stat. 1991–1992 (new 18 U. S. C. §3559 classifying offenses based on "the maximum term of imprisonment authorized . . . by the statute describing the offense"); §235(b)(1)(F), 98 Stat. 2032 ("The maximum term of imprisonment in effect on the effective date [of the Sentencing Reform Act]" remains in effect for five years after the effective date "for an offense committed before the effective date"); §1003(a), *id.*, at 2138 (solicitation to commit a crime of violence punishable by "one-half the maximum term of imprisonment . . . prescribed for the punishment of the crime solicited"). In light of this established pattern and the relative newness of sentencing guidelines systems when the ACCA provision at issue here was added, we conclude that Congress meant for the concept of the "maximum term of imprisonment" prescribed by law for an "offense" to have the same meaning in ACCA.

Our decision in *United States* v. *R. L. C.*, 503 U. S. 291 (1992), is not to the contrary. The statutory provision there, 18 U. S. C. §5037(c) (2000 ed.), set out the term of official detention for a juvenile found to be a delinquent. This provision was amended by the Sentencing Reform Act, see §214, 98 Stat. 2013, and then amended again two years later, see §§21(a)(2)–(4), 100 Stat. 3596. As thus amended, the provision did not refer to the "maximum term of imprisonment" prescribed for an "offense." Rather, the provision focused on the particular juvenile being sentenced. It provided that, "'in the case of a juvenile who is less than eighteen years old,'" official detention could not extend beyond the earlier of two dates: the juvenile's 21st birthday or "'the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult.'" *United States* v. *R. L. C.*, *supra*, at 295–296, n. 1 (quoting 18

U. S. C. §5037(c)). Because this provision clearly focuses on the circumstances of the particular juvenile and not on the offense, 503 U. S., at 299, it is not analogous to the ACCA provision that is before us in this case.

* * *

For these reasons, we hold that the "maximum term of imprisonment . . . prescribed by law" for the state drug convictions at issue in this case was the 10-year maximum set by the applicable recidivist provision. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The Court chooses one reading of the Armed Career Criminal Act (ACCA), 18 U. S. C. §924(e) (2000 ed. and Supp. V), over another that would make at least as much sense of the statute's ambiguous text and would follow the counsel of a tradition of lenity in construing perplexing criminal laws. The Court's choice, moreover, promises hard times for the trial courts that will have to make the complex sentencing calculations this decision demands. I respectfully dissent.

I

The ACCA mandates a 15-year minimum sentence for anyone convicted of violating §922(g) (2000 ed.) who "has three previous convictions [for] a serious drug offense" among his prior crimes. §924(e)(1) (2000 ed., Supp. V). Section 924(e)(2)(A) (2000 ed.) defines "serious drug offense" as an offense under state or federal drug laws, "for which a maximum term of imprisonment of ten years or more is prescribed by law." This limitation leaves open the question whether a given conviction qualifies as "serious" by refer-

ence to the penalty for the acts making up the basic offense, regardless of who commits it, or whether account must also be taken of further facts (such as an offender's criminal record that qualified him for an enhanced penalty at the time of that earlier conviction). If the first alternative is the reading Congress intended, a sentencing judge needs to look only to the penalty specified for the basic offense committed by a first-time offender. But if the second is the intended one, a judge may have to consider sentencing variations (for using a gun, say, or for repeating the offense) set out in other provisions.

It all turns on the meaning of the word "offense," to which the "maximum term" is tied. One can naturally read "an offense" at a general level as synonymous with "a crime," which would tend to rule out reference to maximums adjusted for other facts; we do not usually speak of a crime of "burglary while having a criminal record and while out on bail." Those details would come up only if we were speaking about a specific instance, described as a burglary "committed by someone with a record while out on bail," in which case the other facts may "enhance" his sentence beyond what would have been the maximum term for burglary. The trouble is that "offense" could easily refer to a specific occurrence, too; looking at it that way would make it less jarring to suggest that the circumstances around an event that authorize higher penalty ranges (such as the use of a gun) or the defendant's history (like a prior conviction) ought to count in identifying the maximum penalty for the offense committed on the given day, at the given place, by the particular offender, in a given way. Either reading seems to offer a plausible take on the "offense" for which the ACCA court will have to identify or calculate "maximum" penalties, under state law.

We get no help from imagining the circumstances in which a sentencing court would ask which reading to adopt. The choice of answer would be easy if the question arose in the

mind of a lawyer whose client is thinking about a guilty plea and asks what maximum term he faces. See *ante*, at 383. His lawyer knows that he means the maximum term for him in his case. When a repeat offender wants to know, counsel understands that the penalty prescribed for the basic crime without the recidivist add-on is not the baseline for comparison that may make or break the potential plea agreement. And if the repeat offender faces a further statutory enhancement for carrying a gun during the offense, or for being out on bail, his lawyer would not tell him the maximum term for repeat offenders without guns or bail restrictions. By the same token, if the offender faced (as Rodriquez did) a lower sentence ceiling than what the statute says, by grace of mandatory sentencing guidelines, his lawyer would know enough to tell him that his maximum was capped in this way.

When the issue comes up not in a particular client's questions about his own prospects, however, but in a trial judge's mind wondering about the meaning of the general statute, context gives no ready answer. Nor does it break the tie to say, as the Court does, that taking "maximum" to refer to the basic offense would mean that a recidivist with add-ons could be sentenced above the ACCA "maximum," see *ante*, at 383 ("[E]ven if respondent had been sentenced to, say, six years' imprisonment, 'the maximum term of imprisonment' prescribed by law still would have been five years"). That description, after all, might be just a verbal quirk showing the statutory design in proper working order: if Congress meant an offense to be viewed generically and apart from offender characteristics, a gap between the maximum for ACCA purposes, and a heavier, actual sentence accounting for a defendant's history is to be expected.[1]

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[1] Indeed, if today's decision is read to mean that enhancements only for recidivism need to be counted, then it too permits a defendant's actual sentence for a predicate conviction to be higher than what a federal court identifies as an offense's "maximum term" for ACCA purposes: actual sentences can outstrip the maximum term for recidivists if nonrecidivism fac-

The text does not point to any likelier interpretive choices, and as between these alternatives, it is simply ambiguous.[2] Because I do not believe its ambiguity is fairly resolved in the Government's favor, I would affirm.

II

A

None of the Court's three principal points or ripostes solves the puzzle. To begin with, there is something arbitrary about trying to resolve the ambiguity by rejecting the maximum-for-basic-offense option while declining to consider an entire class of offender-based sentencing adjustments. If offender characteristics are going to count in identifying the relevant maximum penalty, it would seem to follow that in jurisdictions with mandatory sentencing guidelines, the maximum "prescribed by law" would be what the guidelines de-

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tors such as weapons enhancements can also raise a given defendant's statutory ceiling. The Government seems to accept this possibility, noting that "if a statute is as a formal matter structured in such a way as to create broad tiers of punishment for categories of offenders" based on factors other than recidivism, "then certainly that would seem to be an alternative maximum term of imprisonment." Tr. of Oral Arg. 21. The Court, however, does not address this prospect, despite having seen the same kind of result as a dealbreaker for Rodriquez's view.

[2] Even adopting the "alternative" of accounting for an offender's circumstances and record does not resolve the ambiguity, for this rubric actually comprises multiple possibilities under its generic umbrella. Most simply, it might be thought to refer to the actual offender's sentencing range as applied by the state court. At the other extreme, it might mean the maximum for a purely hypothetical "worst" offender who incurs all possible add-ons. Or perhaps it means a fictional version of the actual offender, say, one qualifying for some statutory add-ons but not for any guidelines rules (as the Court would have it); or maybe one who qualifies for both the statutory and the guidelines departures for which the actual offender was eligible, even though not all of those departures were applied by the state court. This menagerie of options would be multiplied, if a court directly confronted the choice whether to count enhancements for offender-based factors other than recidivism, and if so, which.

termine. The original Federal Guidelines, and the mandatory state guidelines I am aware of, were established under statutory authority that invests a guideline with the same legal status as a customary penalty provision. Cf. *United States* v. *R. L. C.*, 503 U. S. 291, 297 (1992) ("The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory").

The Court tries to deflect the implication of its position by denying that state sentencing guidelines really do set maximum penalties, since typically they allow a judge to depart from them, up or down, when specified conditions are met. See *ante*, at 390–391. But while this is true, the objection stands. However a particular mandatory guideline scheme works, it sets a maximum somewhere; if it includes conditions affecting what would otherwise be a guideline maximum, the top of the range as affected should be the relevant maximum on the Court's reading of the statute. Indeed, the factual conditions involved are usually offender characteristics, and if the ACCA is going to count them under offense-defining statutes or freestanding recidivism laws, those same facts ought to count under a guideline rule (whether setting, or authorizing a departure from, a particular limit). There is no practical difference whether maximums are adjusted by a statute, a statutorily mandated guideline, or a guideline-specified departure; wherever a "prescri[ption] by law" resides, it ought to be honored by the ACCA court.

If we were to follow the Court's lights, then, I think we would have to accept the complication that guidelines schemes present, and face the difficulty of calculating enhanced maximums in guidelines jurisdictions.[3] What we cannot do is resolve statutory ambiguity by looking to the

[3] In this case, doing so would likely result in affirmance, because as the Government admits, Rodriquez's guidelines ceiling was just shy of five years. Brief for United States 28.

sentencing range for an imaginary offender who meets statutory conditions for altering the basic sentence, but is artificially stripped of any characteristic that triggers a guideline rule also "prescribed by law."

B

The more fundamental objection, though, goes to the Court's basic conclusion that it makes the better sense to read the ACCA as resting the federal treatment of recidivists on the maximum sentence authorized by state recidivist schemes, in cases where state law must be considered. The Court says it would have been natural for Congress to think in terms of state judgments about repeat criminals when thinking about what to do at the national level, and the Court is quite possibly right about this; the fact that the federal penalty may turn on a state felony classification at all shows that Congress was thinking about state law. But the chances are at least equally good that the Court is wrong; it is odd to think that Congress would have piggybacked the federal system on state repeat-offender schemes, given the extraordinary and irreconcilable variations among state policies on the subject.

For one thing, the States' recidivism schemes vary in their methods for augmenting sentences. Iowa's law, for example, subjects repeat drug offenders to triple penalties, Iowa Code § 124.411(1) (2005); but in Wisconsin a repeat drug distributor will see his maximum term increased by a fixed number of years, whatever the starting point, see, *e. g.*, Wis. Stat. § 961.48(1)(b) (2003–2004) (4-year increase for Class H felony such as selling one kilogram of marijuana).

More striking than differing structures, though, are the vast disparities in severity from State to State: under Massachusetts drug laws, a third conviction for selling a small amount of marijuana carries a maximum of 2.5 years. Mass. Gen. Laws, ch. 94C, § 32C(b) (West 2006). In Delaware, a third conviction means a mandatory sentence of life in prison

without parole. See Del. Code Ann., Tit. 11, § 4214(b) (2007) (third-felony penalty of life without parole for violations of nonnarcotic controlled substances law, Tit. 16, § 4752 (2003)). That Congress might have chosen to defer to state-law judgments about "seriousness" that vary so widely for the same conduct is at least open to doubt. And that doubt only gets worse when we notice that even where two States have similar maximum penalties for a base-level offense, their recidivist enhancements may lead the same conduct to trigger the ACCA sanction in one State but not the other: on the Court's view, an offender's second conviction for selling, say, just over two pounds of marijuana will qualify as an ACCA predicate crime if the conviction occurred in Arizona (maximum of 13 years), Iowa (15 years), Utah (15 years), and the District of Columbia (10 years), for example;[4] but it will fall short of the mark in California (8 years), Michigan (8 years), and New York (8 years).[5] Yet in each of these States, the base-level offense has a maximum term falling within a much narrower range (between 3.5 and 5.5 years).[6] With this backdrop of state law, the Government can hardly be heard

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[4] See Ariz. Rev. Stat. Ann. § 13–604(B) (West Supp. 2007) (maximum set at 13 years); Iowa Code §§ 124.401(1)(*d*), 902.9(5), 124.411 (2005) (basic-offense maximum is tripled to 15 years); Utah Code Ann. §§ 58–37–8(1)(b)(ii) (Lexis 2007 Supp. Pamphlet), 76–3–203(2) (Lexis 2003) (15 years); D. C. Code §§ 48–904.01(a)(2)(B) (2007 Supp. Pamphlet), 48–904.08(a) (2001) (basic-offense maximum is doubled to 10 years).

[5] See Cal. Health & Safety Code Ann. § 11360 (West 2007); Cal. Penal Code Ann. § 1170.12(c)(1) (West 2004) (basic-offense maximum is doubled to 8 years); Mich. Comp. Laws Ann. §§ 333.7401(2)(d)(*iii*) (West Supp. 2008), 333.7413(2) (2001) (basic-offense maximum is doubled to 8 years); N. Y. Penal Law Ann. §§ 221.55 (West 2001), 70.70(3)(b)(ii) (West Supp. 2008) (maximum set at 8 years).

[6] See Ariz. Rev. Stat. Ann. §§ 13–3405(B)(5), 13–701(C) (West 2001) (maximum set at 3.5 years); Cal. Health & Safety Code Ann. § 11360 (4 years); D. C. Code § 48–904.01(a)(2)(B) (5 years); Iowa Code §§ 124.401(1)(*d*), 902.9(5) (5 years); Mich. Comp. Laws Ann. § 333.7401(2)(d)(*iii*) (4 years); N. Y. Penal Law Ann. §§ 221.55, 70.70(2)(a)(ii) (5.5 years); Utah Code Ann. §§ 58–37–8(1)(b)(ii), 76–3–203(3) (5 years).

to say that there would be something "incongruous" about a federal law targeting offenses flagged by the penalties assigned only to bare conduct, without regard to recidivism or other offender facts. Brief for United States 17.

Nor does it show what the ACCA means by "maximum" or "offense" when the Court points to language from our prior cases saying that enhanced recidivist penalties are not to be viewed as retroactive punishment for past crimes, for purposes of double-jeopardy and right-to-counsel enquiries. See *ante*, at 385–386 (citing *Nichols* v. *United States*, 511 U. S. 738, 747 (1994), and *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948)). The quotations show that a separate offense is identified by an enhanced penalty, the Court says, because from them we can draw the conclusion that "[w]hen a defendant is given a higher sentence under a recidivism statute," nonetheless "100% of the punishment is for the offense of conviction," leaving nothing to be attributed to "prior convictions or the defendant's 'status as a recidivist,'" *ante*, at 386.

Still, the fact is that state-law maximums for repeat offenders sometimes bear hardly any relation to the gravity of the triggering offense, as "three-strikes" laws (not to mention the Delaware example, above) often show. See, *e. g.*, Ill. Comp. Stat., ch. 720, § 5/33B–1 (2004) (mandatory life sentence for third "Class X" felony, such as dealing heroin, without regard to the specific penalty gradation for the latest Class X felony or to any similarity with prior offenses); W. Va. Code Ann. § 61–11–18(c) (2005) (if offender was "twice before convicted in the United States of a crime punishable by confinement in a penitentiary," third such conviction incurs a mandatory life sentence). Cf. *Ewing* v. *California*, 538 U. S. 11, 30, n. 2 (2003) (plurality opinion) (the "California Legislature therefore made a deliberate policy decision . . . that the gravity of the new felony should not be a determinative factor in triggering the application of the Three Strikes Law" (internal quotation marks omitted)). And there is no

denying that the fact of prior convictions (or a defendant's recidivist status) is necessary for the "'stiffened penalty'" to be imposed for "'the latest crime,'" *ante*, at 386, the necessary fact being specific to the offender, and falling outside the definition of the offense. This is, after all, what it means to apply an "enhancement."

The upshot is that it may have been natural for Congress to think of state recidivism schemes, but it may well not have been. If there is anything strange about ignoring enhanced penalties, there is something at least as strange about a federal recidivist statute that piles enhancement on enhancement, magnifying the severity of state laws severe to begin with.

C

Whatever may be the plausibility of the offender-based reading of the statute as the Court describes it, the Court's description avoids a source of serious doubt by glossing over the practical problems its take on the statute portends. The Court is unmoved by the argument that Congress probably did not expect federal courts applying the ACCA to master the countless complications of state sentencing schemes; because all jurisdictions provide for enhanced sentencing some way or another, the Court thinks there is nothing threatening in the subject, which it tries to simplify by offering a few practical pointers. It notes that there will be cases with a qualifying enhancement "evident from the length of the sentence imposed" by the state court; sometimes, it says, a court's "judgment of conviction will . . . list the maximum possible sentence"; or the state prosecutor will have "submit[ted] a formal charging document in order to obtain a recidivist enhancement." *Ante*, at 389. And in cases involving pleas, the Court notes, "the plea colloquy will very often include a statement by the trial judge regarding the maximum penalty." *Ibid.* Even when there are no pointers to help, says the Court, and "the records that may properly be

consulted" yield no clear answer, the worst that can happen will be the Government's inability to show that a prior conviction qualifies. *Ante*, at 389.

But it is not that easy, and the Court's pointers are not much comfort. To start with, even where a "maximum" sentence is mentioned in state records, how will the ACCA court be supposed to know that the "maximum" written down there is what the Court today holds that "maximum" means? A State's number below 10 years may refer to the base-level offense, or it may be the reduced maximum required by mandatory guidelines; and a number over 10 years may be the product of other enhancements (as for weapons use or being out on bail at the time of commission). Having to enquire into just what imposed sentences or what trial documents really mean would seem to leave plenty of sorting out for the federal courts to do (or at least, for federal prosecutors, if they end up with the job).

Another example: state laws are not written to coordinate with the ACCA, and if a State's specific repeat drug-offender provisions, say, are supposed to be read together with its general habitual-offender statutes, the resulting "maximum" may not be the Court's "maximum." Indeed, a federal court may have to figure out just how those state statutes may be read together to avoid conflict between them, when the way to avoid conflict is not clear cut even for the state courts, see, *e. g.*, *Goldberg* v. *State*, 282 Ga. 542, 651 S. E. 2d 667 (2007) (general recidivist statute trumps more specific one; overruling same court's decision in *Mikell* v. *State*, 270 Ga. 467, 510 S. E. 2d 523 (1999)); *State* v. *Keith*, 102 N. M. 462, 697 P. 2d 145 (App. 1985) (specific trumps general). Cf. *Clines* v. *State*, 912 So. 2d 550 (Fla. 2005) (relying on rule of lenity to resolve whether multiple recidivist categories in same habitual-offender law could apply to a single sentence).

And there is more: as Rodriquez reminds us, just deciding what counts as a "prior" offense under state law is not always an easy thing. See *People* v. *Wiley*, 9 Cal. 4th 580,

583, 889 P. 2d 541, 542 (1995) (noting difficulty of applying requirement that "prior" charges have been "brought and tried separately," where defendant had been convicted in trials occurring one day apart and sentenced at the same court session; in the end, drawing the needed inference from docket numbers revealed on documents requested from the municipal trial court); *id.*, at 595, 889 P. 2d, at 550 (Werdegar, J., dissenting) (protesting the court's solicitation and use of extrarecord documents). Nor would that sort of enquiry get any easier, or be more likely to benefit from well-settled state law, when a given State's law takes account of prior offenses in other States, see *Timothy* v. *State*, 90 P. 3d 177 (Alaska App. 2004) (holding Oklahoma burglary not to be analogous to one in Alaska, for purposes of Alaska's recidivism enhancements, thus overruling its own 2-year-old decision, *Butts* v. *State*, 53 P. 3d 609 (2002)); or, to take a specific example, when what qualifies a prior offense under one State's recidivism scheme is the length of the sentence authorized by another State's law (raising the question whether that first State would see recidivist enhancements the same way the Court does today). See, *e. g.*, N. J. Stat. Ann. §2C:44–4(c) (West 2005) ("A conviction in another jurisdiction shall constitute a prior conviction of a crime if a sentence of imprisonment in excess of 6 months was authorized under the law of the other jurisdiction"); N. M. Stat. Ann. §31–18–17(D)(2)(b) (2007 Supp.) (defining "prior felony conviction" as, *inter alia*, a felony "punishable [by] a maximum term of imprisonment of more than one year").

A still thornier problem is how federal courts are supposed to treat a State's procedural safeguards for using prior convictions at sentencing. Saying that congressional deference to the States' judgments about the severity of crimes also extends to their judgments about recidivism raises, but does not answer, the question whether such deference goes only as far as the state courts themselves could go in raising penalties. (The Court's disregard of mandatory sentencing

guidelines would seem to suggest that the answer is no.) In those States that require notice before the prosecutor can seek a recidivism enhancement, for example, how will a federal court decide whether the ACCA counts a prior conviction that would have qualified for recidivism enhancement if the state prosecutor had not failed to give timely notice? See, *e. g.*, *Commonwealth* v. *Fernandes*, 430 Mass. 517, 522, 722 N. E. 2d 406, 409 (1999) (noting longstanding rule that the indictment must give notice of prior convictions "that may subject the defendant to enhanced punishment").

I could go on, but this is enough to show that the Court's interpretation promises that ACCA courts will face highly complicated enquiries into every State's or Territory's collection of ancillary sentencing laws. That is an unconvincing answer to the ambiguity.

III

At the end of the day, a plainly superior reading may well be elusive; one favoring the Government certainly is. It does not defy common English or common sense, after all, to look at a statute with one penalty range for the basic crime and a higher one for a repeat offender and say that the former sets the maximum penalty for the "offense"; but neither is it foolish to see the "offense" as defined by its penalty, however that is computed. What I have said so far suggests that I think the basic-crime view of "offense" is the better one, but I will concede that the competing positions are pretty close to evenly matched. And on that assumption, there is a ready tiebreaker.

The interpretation adopted by both the District Court and the Court of Appeals is the one counseled by the rule of lenity, which applies where (as here) we have "'seiz[ed] every thing from which aid can be derived,'" but are "left with an ambiguous statute," *United States* v. *Bass*, 404 U. S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 2 Cranch 358, 386 (1805) (opinion for the Court by Marshall, C. J.)). The rule is grounded in "'the instinctive distaste against men languish-

ing in prison unless the lawmaker has clearly said they should,'" *Bass*, *supra*, at 348 (quoting H. Friendly, Benchmarks 209 (1967)), and we have used it to resolve questions both about metes and bounds of criminal conduct and about the severity of sentencing, see *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980) (collecting cases). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U. S. 169, 178 (1958).

This is why lenity should control here. Even recognizing the best that can be said for the Government's side, its position rests on debatable guesswork to send a man to prison for 180 months, as against 92 months on the basic-crime view. And the District Courts will be imposing higher sentences more than doubling the length of the alternative in a good many other cases, as well.

The "fair warning" that motivates the lenity rule, *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931) (opinion for the Court by Holmes, J.), may sometimes be a benign fiction, see *R. L. C.*, 503 U. S., at 309 (SCALIA, J., concurring in part and concurring in judgment), but there is only one reading of this statute with any realistic chance of giving fair notice of how the ACCA will apply, and that is the reading the District Court and the Court of Appeals each chose. Their choice should be ours, too.

Syllabus

RILEY, GOVERNOR OF ALABAMA *v.* KENNEDY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 07–77. Argued March 24, 2008—Decided May 27, 2008

Section 5 of the Voting Rights Act of 1965 (VRA) requires "covered jurisdictions" to obtain preclearance from the District Court for the District of Columbia or the Department of Justice (DOJ) before "enact[ing] or seek[ing] to administer" any changes in their practices or procedures affecting voting.

Alabama is a covered jurisdiction. As of its November 1, 1964 coverage date, state law provided that midterm vacancies on county commissions were to be filled by gubernatorial appointment. In 1985, the state legislature passed, and the DOJ precleared, a "local law" providing that Mobile County Commission midterm vacancies would be filled by special election rather than gubernatorial appointment. In 1987, the Governor called a special election for the first midterm opening on the Commission postpassage of the 1985 Act. A Mobile County voter, Willie Stokes, filed suit in state court seeking to enjoin the election, but the state trial court denied his request. Although Stokes immediately appealed to the Alabama Supreme Court, the special election went forward and the winner took office. Subsequently, however, the Alabama Supreme Court reversed the trial court's judgment, finding that the 1985 Act violated the State Constitution.

When the next midterm Commission vacancy occurred in 2005, the method of filling the opening again became the subject of litigation. In 2004, the state legislature had passed, and the DOJ had precleared, a law providing for gubernatorial appointment as the means to fill county commission vacancies unless a local law authorized a special election. When the vacancy arose, appellee voters and state legislators (hereinafter Kennedy) filed suit against the Governor in state court, asserting that the 2004 Act had revived the 1985 Act and cured its infirmity under the Alabama Constitution. Adopting Kennedy's view, the trial court ordered the Governor to call a special election. Before the election took place, however, the Alabama Supreme Court reversed the trial court's order, holding that the 2004 Act did not resurrect the 1985 Act. The Governor therefore filled the vacancy by appointment, naming Commissioner Chastang to the open seat. Kennedy then commenced this suit in Federal District Court. Invoking § 5 of the VRA, she sought declaratory relief and an injunction barring the Governor from filling the

Syllabus

Commission vacancy by appointment unless and until Alabama gained preclearance of the *Stokes* and *Kennedy* decisions. A three-judge District Court granted the requested declaration in August 2006. It determined that the "baseline" against which any change should be measured was the 1985 Act's provision requiring special elections, a measure both precleared and put into "force or effect" with the special election in 1987. It followed, the District Court reasoned, that the gubernatorial appointment called for by *Stokes* and *Kennedy* ranked as a change from the baseline practice; consequently, those decisions should have been precleared. Deferring affirmative relief, the District Court gave the State 90 days to obtain preclearance. When the DOJ denied the State's request for preclearance, Kennedy returned to the District Court and filed a motion for further relief. On May 1, 2007, the District Court vacated the Governor's appointment of Chastang to the Commission, finding it unlawful under §5 of the VRA. The Governor filed a notice of appeal in the District Court on May 18.

Held:

1. Because the District Court did not render its final judgment until May 1, 2007, the Governor's May 18 notice of appeal was timely. Under §5, "any appeal" from the decision of a three-judge district court "shall lie to the Supreme Court," 42 U. S. C. §1973c(a), but the appeal must be filed within 60 days of a district court's entry of a final judgment, see 28 U. S. C. §2101(b). Kennedy maintains that the District Court's August 2006 order qualified as a final judgment, while the Governor maintains that the District Court's final judgment was the May 1 order vacating Chastang's appointment. A final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U. S. 229, 233. The August 2006 order declared that preclearance was required for the *Stokes* and *Kennedy* decisions, but left unresolved Kennedy's demand for injunctive relief. An order resolving liability without addressing a plaintiff's requests for relief is not final. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U. S. 737, 742–743. Pp. 418–420.

2. For §5 purposes, the 1985 Act never gained "force or effect." Therefore, Alabama's reinstatement of its prior practice of gubernatorial appointment did not rank as a "change" requiring preclearance. Pp. 420–429.

(a) In order to determine whether an election practice constitutes a "change" as defined in this Court's §5 precedents, the practice must be compared with the covered jurisdiction's "baseline," *i. e.*, the most recent practice both precleared and "in force or effect"—or, absent any change since the jurisdiction's coverage date, the practice "in force or

effect" on that date. See *Young* v. *Fordice*, 520 U. S. 273, 282–283. Pp. 420–422.

(b) While not controlling here, three precedents addressing §5's term of art "in force or effect" provide the starting point for the Court's inquiry. In *Perkins* v. *Matthews*, 400 U. S. 379, the question was what practice had been "in force or effect" in Canton, Mississippi, on that State's 1964 coverage date. A 1962 state law required at-large elections for city aldermen, but Canton had elected aldermen by wards in 1961 and again in 1965. This Court held that the city's 1969 attempt to move to at-large elections was a change requiring preclearance because election by ward was "the procedure *in fact* 'in force or effect' in Canton" on the coverage date. *Id.*, at 395. Similarly, in *City of Lockhart* v. *United States*, 460 U. S. 125, the question was what practice had been "in force or effect" in Lockhart, Texas, on the relevant coverage date. The city had used a "numbered-post" system to elect its city council for more than 50 years. Though the numbered-post system's validity under state law was "not entirely clear," *id.*, at 132, "[t]he proper comparison [wa]s between the new system and the system actually in effect on" the coverage date, "regardless of what state law might have required," *ibid.* Finally, in *Young* v. *Fordice*, the question was whether a provisional voter registration plan precleared and implemented by Mississippi election officials, who believed that the state legislature was about to amend the relevant law, had been "in force or effect." See 520 U. S., at 279. As it turned out, the state legislature failed to pass the amendment, and voters who had registered under the provisional plan were required to reregister. This Court held that the provisional plan was a "temporary misapplication of state law" that, for §5 purposes, was "never 'in force or effect.'" *Id.*, at 282. *Young* thus qualified the general rule of *Perkins* and *Lockhart:* A practice best characterized as nothing more than a "temporary misapplication of state law" is *not* "in force or effect," even if actually implemented by state election officials, 520 U. S., at 282. Pp. 422–424.

(c) If the only relevant factors were the length of time a practice was in use and the degree to which it was implemented, this would be a close case under *Perkins*, *Lockhart*, and *Young*. But an extraordinary circumstance not present in any past case is operative here, impelling the conclusion that the 1985 Act was never "in force or effect": The Act was challenged in state court at first opportunity, the lone election was held in the shadow of that legal challenge, and the Act was ultimately invalidated by the Alabama Supreme Court. These characteristics plainly distinguish this case from *Perkins* and *Lockhart*, where the state judiciary had no involvement. The prompt legal challenge and the State Supreme Court's decision also provide strong cause to conclude

that, in the §5 context, the 1985 Act was never "in force or effect." A State's highest court is unquestionably "the ultimate exposito[r] of state law." *Mullaney* v. *Wilbur*, 421 U. S. 684, 691. And because the State Supreme Court's prerogative to say what Alabama law is merits respect in federal forums, a law challenged at first opportunity and invalidated by Alabama's highest court is properly regarded as null and void *ab initio*, incapable of effecting any change in Alabama law or establishing a voting practice under §5. There is no good reason to hold otherwise simply because Alabama's highest court did not render its decision until after an election was held. To the contrary, practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges. Cf. *Purcell* v. *Gonzalez*, 549 U. S. 1, 5–6 *(per curiam)*. Ruling otherwise would have the anomalous effect of binding Alabama to an unconstitutional practice because of the state trial court's error. The trial court misconstrued the State's law and, due to that court's error, an election took place. That sequence of events, the District Court held, made the 1985 Act part of Alabama's §5 baseline. In essence, the District Court's decision gave controlling effect to the erroneous trial court ruling and rendered the Alabama Supreme Court's corrections inoperative. That sort of interference with a state supreme court's ability to determine the content of state law is more than a hypothetical concern. The realities of election litigation are such that lower state courts often allow elections to proceed based on erroneous interpretations of state law later corrected on appeal. The Court declines to adopt a rigid interpretation of "in force or effect" that would deny state supreme courts the opportunity to correct similar errors in the future. Pp. 424–428.

(d) Although this Court's reasoning and the facts of this case should make the narrow scope of the holding apparent, some cautionary observations are in order. First, the presence of a judgment by Alabama's highest court invalidating the 1985 Act under the State Constitution is critical here. The outcome might be different were a potentially unlawful practice simply abandoned by state officials after initial use in an election. Cf. *Perkins*, 400 U. S., at 395. Second, the 1985 Act was challenged the first time it was invoked and struck down shortly thereafter. The same result would not necessarily follow if a practice were invalidated only after enforcement without challenge in several previous elections. Cf. *Young*, 520 U. S., at 283. Finally, the consequence of the Alabama Supreme Court's *Stokes* decision was to reinstate a practice—gubernatorial appointment—identical to the State's §5 baseline. Preclearance might well have been required had the court instead ordered the State to adopt a novel practice. Pp. 428–429.

Reversed and remanded.

Syllabus

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 429.

Kevin C. Newsom argued the cause for appellant. With him on the briefs were *Troy King*, Attorney General of Alabama, and *Margaret L. Fleming*, *James W. Davis*, and *Misty S. Fairbanks*, Assistant Attorneys General, *Matthew H. Lembke*, *John C. Neiman, Jr.*, and *Scott Burnett Smith*.

Pamela S. Karlan argued the cause for appellees. With her on the brief were *Edward Still*, *Amy Howe*, *Kevin Russell*, *Sam Heldman*, *Jeffrey L. Fisher*, and *Thomas C. Goldstein*.

Kannon K. Shanmugam argued the cause for the United States as *amicus curiae* supporting appellees in part. On the brief were *Solicitor General Clement*, *Acting Assistant Attorney General Becker*, *Deputy Solicitor General Garre*, *Eric D. Miller*, *Diana K. Flynn*, *Gregory B. Friel*, and *Sarah E. Harrington*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Bill McCollum*, Attorney General of Florida, *Gene C. Schaerr*, and *Steffen N. Johnson*, and by the Attorneys General for their respective States as follows: *Talis J. Colberg* of Alaska, *James D. Caldwell* of Louisiana, *Kelly A. Ayotte* of New Hampshire, *Gary K. King* of New Mexico, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, and *Bob McDonnell* of Virginia; for the Project on Fair Representation by *Bert W. Rein;* for Former State Court Justice Charles Fried et al. by *H. Christopher Bartolomucci;* and for Abigail Thernstrom et al. by *Keith A. Noreika*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Laughlin McDonald*, *Neil Bradley*, and *Steven R. Shapiro;* for the Lawyers' Committee for Civil Rights Under Law by *Jonathan E. Nuechterlein*, *Daniel S. Volchok*, and *Jon M. Greenbaum;* and for the NAACP Legal Defense and Educational Fund, Inc., by *Kristen Clarke*, *Theodore M. Shaw*, *Jacqueline A. Berrien*, *Debo P. Adegbile*, and *Ryan P. Haygood*.

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents a novel question concerning §5 of the Voting Rights Act of 1965. The setting, in a nutshell: A covered State passed a law adopting a new election practice, obtained the preclearance required by §5, and held an election. Soon thereafter, the law under which the election took place was invalidated by the State's highest court on the ground that it violated a controlling provision of the State's Constitution. The question presented: Must the State obtain fresh preclearance in order to reinstate the election practice prevailing before enactment of the law struck down by the State's Supreme Court? We hold that, for §5 purposes, the invalidated law never gained "force or effect." Therefore, the State's reversion to its prior practice did not rank as a "change" requiring preclearance.

I

The Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 42 U. S. C. §1973 *et seq.*, "was designed by Congress to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966). In three earlier statutes, passed in 1957, 1960, and 1964, Congress had empowered the Department of Justice (DOJ or Department) to combat voting discrimination through "case-by-case litigation." *Id.*, at 313. These lawsuits, however, made little headway. Voting-rights suits were "unusually onerous to prepare" and the progress of litigation was "exceedingly slow," in no small part due to the obstructionist tactics of state officials. *Id.*, at 314. Moreover, some States "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.*, at 335.

The VRA reflected Congress' determination that "sterner and more elaborate measures" were needed to counteract these formidable hindrances. *Id.*, at 309. Sections 4 and 5 impose the most stringent of the Act's remedies. Under § 4(b), as amended, a State or political subdivision is a so-called "covered jurisdiction" if, on one of three specified coverage dates: (1) it maintained a literacy requirement or other "test or device" as a prerequisite to voting, and (2) fewer than 50% of its voting-age citizens were registered to vote or voted in that year's Presidential election. 42 U. S. C. § 1973b(b). Section 4(a) suspends the operation of all such "test[s] or device[s]" in covered jurisdictions. § 1973b(a). Section 5 requires covered jurisdictions to obtain what has come to be known as "preclearance" from the District Court for the District of Columbia or the DOJ before "enact[ing] or seek[ing] to administer" any alteration of their practices or procedures affecting voting. § 1973c(a).

A change will be precleared only if it "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [because of membership in a language minority group]." *Ibid.* An election practice has the "effect" of "denying or abridging the right to vote" if it "lead[s] to a retrogression in the position of racial [or language] minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). See also *Young* v. *Fordice*, 520 U. S. 273, 276 (1997); 28 CFR § 51.54 (2007). As amended in 2006, the statute defines "purpose" to include "any discriminatory purpose." 120 Stat. 581, codified at 42 U. S. C. § 1973c(c).

Congress took the extraordinary step of requiring covered jurisdictions to preclear all changes in their voting practices because it "feared that the mere suspension of existing tests [in § 4(a)] would not completely solve the problem, given the history some States had of simply enacting new and slightly

different requirements with the same discriminatory effect." *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 548 (1969). By putting the burden on covered jurisdictions to demonstrate that future changes would not be discriminatory, § 5 served to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Katzenbach*, 383 U. S., at 328.

Sections 4 and 5 were originally scheduled to lapse once a covered jurisdiction complied with § 4(a)'s ban on the use of tests and devices for five years. See 79 Stat. 438. Finding continuing discrimination in access to the ballot, however, Congress renewed and expanded §§ 4 and 5 on four occasions, most recently in 2006.[1] Sections 4 and 5 are now set to expire in 2031, see 42 U. S. C. § 1973b(a)(8), but a covered jurisdiction may "bail out" at any time if it satisfies certain requirements, see § 1973b(a)(1).

II

The voting practice at issue in this litigation is the method used to fill midterm vacancies on the Mobile County Commission, the governing body of Mobile County, Alabama. Composed of three members elected by separate districts to four-year terms, the Commission has the power to levy taxes, make appropriations, and exercise other countywide executive and administrative functions. See Ala. Code § 11–3–11 (1975).

We set out first, as pivotal to our resolution of this case, a full account of two disputes over the means of filling midterm vacancies on the Commission. The first occurred between 1985 and 1988; the second began in 2004 and culminates in the appeal now before us.

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[1] See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577; Voting Rights Act Amendments of 1982, 96 Stat. 131; Voting Rights Act Amendments of 1975, 89 Stat. 400; Voting Rights Act Amendments of 1970, 84 Stat. 314.

A

Alabama is a covered jurisdiction with a coverage date of November 1, 1964. See 30 Fed. Reg. 9897 (1965). As of that date, Alabama law provided that midterm vacancies on all county commissions were to be filled by gubernatorial appointment. See Ala. Code § 12–6 (1958). The relevant provision was later recodified without substantive change as Ala. Code § 11–3–6 (1975), which stated:

> "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

In 1985, however, the state legislature passed a "local law" providing that any vacancy on the Mobile County Commission occurring "with twelve months or more remaining on the term of the vacant seat" would be filled by special election rather than gubernatorial appointment. 1985 Ala. Acts no. 85–237 (1985 Act).[2] The DOJ precleared this new law in June 1985.

The first midterm opening on the Commission postpassage of the 1985 Act occurred in 1987, when the seat for District One—a majority African-American district—became vacant. In accord with the 1985 Act, the Governor called a special election. A Mobile County voter, Willie Stokes, promptly filed suit in state court seeking to enjoin the election. The 1985 Act, he alleged, violated Art. IV, § 105, of the Alabama Constitution, which provides that no "local law . . . shall be

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[2] Under the Alabama Constitution, a "general" law is "a law which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class." Art. IV, § 110. A "special or private" law is a law that "applies to an individual, association or corporation." *Ibid.* A "local" law is "a law which is not a general law or a special or private law." *Ibid.* The 1985 Act was a local law because it applied only to Mobile County; the remainder of the State continued to be governed by Ala. Code § 11–3–6 (1975).

enacted in any case which is provided for by a general law." On Stokes's reading, the 1985 Act conflicted with § 105 because the Act addressed a matter already governed by Ala. Code § 11–3–6.

The state trial court rejected Stokes's argument and entered judgment for the state defendants. Stokes immediately appealed to the Alabama Supreme Court and sought an order staying the election pending that court's decision. The requested stay was denied, and the special election went forward in June 1987. The winner, Samuel Jones, took office as District One's Commissioner in July 1987. Approximately 14 months later, however, in September 1988, the Alabama Supreme Court reversed the trial court's judgment. Finding that the 1985 Act "clearly offend[ed] § 105 of the [Alabama] Constitution," the court declared the Act unconstitutional. *Stokes* v. *Noonan*, 534 So. 2d 237, 238–239.

The Alabama Supreme Court's decree cast grave doubt on the legitimacy of Jones's election and, consequently, on his continued tenure in office. The Governor, however, defused any potential controversy by immediately invoking his authority under Ala. Code § 11–3–6 and appointing Jones to the Commission.

B

The next midterm vacancy on the Commission did not occur until October 2005, when Jones—who had been reelected every four years since 1988—was elected mayor of the city of Mobile. Once again, the method of filling the vacancy became the subject of litigation. In 2004, the state legislature had passed (and the DOJ had precleared) an amendment to Ala. Code § 11–3–6 providing that vacancies on county commissions were to be filled by gubernatorial appointment "[u]nless a local law authorizes a special election." 2004 Ala. Acts no. 2004–455 (2004 Act). When the 2005 vacancy arose, three Mobile County voters and Alabama state legislators—appellees Yvonne Kennedy, James Buskey, and William Clark (hereinafter Kennedy)—filed suit

against Alabama's Governor, Bob Riley, in state court. The 2004 Act's authorization of local laws providing for special elections, they urged, had revived the 1985 Act and cured its infirmity under § 105 of the Alabama Constitution. Adopting Kennedy's view, the state trial court ordered Governor Riley to call a special election.

While the Governor's appeal to the Alabama Supreme Court was pending, Mobile County's election officials obtained preclearance of procedures for a special election, scheduled to take place in January 2006. In November 2005, however, the Alabama Supreme Court reversed the trial court's order. Holding that the 2004 Act "provide[d] for prospective application only" and thus did not resurrect the 1985 Act, Alabama's highest court ruled that "Governor Riley [wa]s authorized to fill the vacancy on the Mobile County Commission by appointment." *Riley* v. *Kennedy*, 928 So. 2d 1013, 1017. Governor Riley promptly exercised that authority by appointing Juan Chastang.

The day after the Alabama Supreme Court denied rehearing, Kennedy commenced the instant suit in Federal District Court. Invoking § 5, she sought declaratory relief and an injunction barring Governor Riley from filling the Commission vacancy by appointment unless and until Alabama gained preclearance of the decisions in *Stokes* and *Kennedy*. As required by § 5, a three-judge District Court convened to hear the suit. See 42 U. S. C. § 1973c(a); *Allen*, 393 U. S., at 563.

In August 2006, the three-judge court, after a hearing, granted the requested declaration. The court observed first that for purposes of § 5's preclearance requirement, "[c]hanges are measured by comparing the new challenged practice with the baseline practice, that is, the most recent practice that is both precleared and in force or effect." 445 F. Supp. 2d 1333, 1336 (MD Ala.). It then determined that the 1985 Act's provision requiring special elections had been both precleared and put into "force or effect" with the special

election of Jones in 1987. It followed, the District Court reasoned, that the gubernatorial appointment called for by *Stokes* and *Kennedy* ranked as a change from the baseline practice; consequently "the two [Alabama Supreme Court] decisions . . . should have been precleared before they were implemented." 445 F. Supp. 2d, at 1336.

Deferring affirmative relief, the District Court gave the State 90 days to obtain preclearance of *Stokes* and *Kennedy*. 445 F. Supp. 2d, at 1336. Without conceding that preclearance was required, the State submitted the decisions to the DOJ. Finding that the State had failed to prove that the reinstatement of gubernatorial appointment would not be retrogressive, the Department denied preclearance. See App. to Motion to Dismiss or Affirm 2a–8a. "The African-American voters of District 1," the DOJ explained, "enjoy the opportunity to elect minority candidates of their choice" under the 1985 Act. *Id.*, at 6a. A change to gubernatorial appointment would be retrogressive because it "would transfer this electoral power to a state official elected by a statewide constituency whose racial make-up and electoral choices regularly differ from those of the voters of District 1." *Ibid.*

After the State unsuccessfully sought DOJ reconsideration, Kennedy returned to the District Court and filed a motion for further relief. On May 1, 2007, the District Court ruled that "Governor Bob Riley's appointment of Juan Chastang to the Mobile County Commission . . . was unlawful under federal law" and vacated the appointment. App. to Juris. Statement 1a–2a. Governor Riley filed a notice of appeal in the District Court on May 18, 2007, and a jurisdictional statement in this Court on July 17, 2007. In November 2007, we postponed a determination of jurisdiction until our consideration of the case on the merits. 552 U. S. 1035.

In the meantime, a special election was held in Mobile County in October 2007 to fill the vacancy resulting from

the District Court's order vacating Chastang's appointment.[3] Chastang ran in the election but was defeated by Merceria Ludgood, who garnered nearly 80% of the vote. See Certification of Results, Special Election, Mobile County (Oct. 16, 2007), http://records.mobile-county.net/ViewImagesPDFAll.Aspx?ID=2007081288 (as visited May 22, 2008, and available in Clerk of Court's case file). Ludgood continues to occupy the District One seat on the Commission. Her term will expire in November 2008.[4]

III

Before reaching the merits of Governor Riley's appeal, we first take up Kennedy's threshold objection. The appeal, Kennedy urges, must be dismissed as untimely.

Section 5 provides that "any appeal" from the decision of a three-judge district court "shall lie to the Supreme Court." 42 U. S. C. §1973c(a). Such an appeal must be filed within 60 days of the District Court's entry of a final judgment. See 28 U. S. C. §2101(b). Kennedy maintains that Governor Riley's May 18, 2007 notice of appeal came too late because the District Court's August 2006 order qualified as a final judgment. If Kennedy's characterization is correct, then Governor Riley's time to file an appeal expired in October 2006, and his appeal must be dismissed. But if, as Governor Riley maintains, the District Court did not issue a final judgment until the order vacating Chastang's appoint-

[3] The District Court denied the Governor's motion to stay its judgment pending this appeal. See App. 7.

[4] Regardless of the outcome of this litigation, the method for filling future midterm vacancies on the Commission appears to have been settled. In 2006, the Alabama Legislature enacted a new measure providing that, on a going-forward basis, vacancies on the Commission will be filled by special election. See 2006 Ala. Acts no. 2006–342. The DOJ precleared the statute in July 2007. The passage of this law does not render this case moot: If the Governor prevails in his appeal, Chastang may seek reinstatement to the Commission to serve out the remainder of the term ending in November 2008. See Brief for United States as *Amicus Curiae* 5, n. 1.

ment on May 1, 2007, then the Governor filed his appeal well within the required time.

A final judgment is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U. S. 229, 233 (1945).[5] The District Court's August 2006 order declared that the Alabama Supreme Court's decisions in *Stokes* and *Kennedy* required preclearance, but that order left unresolved Kennedy's demand for injunctive relief. We have long held that an order resolving liability without addressing a plaintiff's requests for relief is not final. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U. S. 737, 742–743 (1976). See also 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3915.2, p. 271 (2d ed. 1992).

Resisting the conclusion these authorities indicate, Kennedy maintains that the August 2006 order ranked as a final decision for two reasons. First, she contends, that order conclusively settled the key remedial issue, for it directed Governor Riley to seek preclearance of the Alabama Supreme Court's decisions in *Stokes* and *Kennedy*. See Brief for Appellees 26–27. This argument misapprehends the District Court's order: Far from requiring the Governor to seek preclearance, the District Court expressly allowed for the possibility that he would elect not to do so. See 445 F. Supp. 2d, at 1337 ("Defendant Riley is to keep the court informed of what action, *if any*, the State decides to take . . . ." (emphasis added)). Second, Kennedy notes that the District Court directed entry of its August 2006 order "as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure," *ibid.* See Brief for Appellees 27. "The label used by the District Court," however, "cannot control [an] order's appealability." *Sullivan* v. *Finkelstein*,

[5] *Catlin* and the other authorities cited in this Part interpret the meaning of "final decisions" in 28 U. S. C. §1291, the statute governing appeals from district courts to the courts of appeals. We find them instructive in interpreting the parallel term "final" judgment in §2101(b).

496 U. S. 617, 628, n. 7 (1990). See also *Wetzel*, 424 U. S., at 741–743.

Because the District Court did not render its final judgment until May 1, 2007, Governor Riley's May 18 notice of appeal was timely. We therefore proceed to the merits.

IV

Prior to 1985, Alabama filled midterm vacancies on the Mobile County Commission by gubernatorial appointment. The 1985 Act adopted a different practice—special elections. That new practice was used in one election only, held in 1987. The next year, the Alabama Supreme Court determined, in *Stokes* v. *Noonan*, that the Act authorizing special elections was invalid under the State's Constitution. Properly framed, the issue before us is whether §5 required Alabama to obtain preclearance before reinstating the practice of gubernatorial appointment in the wake of the decision by its highest court invalidating the special-election law.[6]

It is undisputed that a "change" from election to appointment is a change "with respect to voting" and thus covered by §5. See *Allen*, 393 U. S., at 569–570; *Presley* v. *Etowah*

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[6] As framed by the District Court, the issue was whether the Alabama Supreme Court's decisions in *Stokes* v. *Noonan*, 534 So. 2d 237 (1988), and *Riley* v. *Kennedy*, 928 So. 2d 1013 (2005), should have been precleared. See 445 F. Supp. 2d, at 1336. This formulation, we conclude, misstates the issue in two technical respects. First, §5 requires a covered jurisdiction to seek preclearance of any changed "practice . . . with respect to voting." 42 U. S. C. §1973c(a). The "practice" at issue here is gubernatorial appointment. That practice, and not the Alabama Supreme Court's interpretation of state law in *Stokes* and *Kennedy*, is the proper subject of the §5 inquiry. Second, as Governor Riley noted, see Brief for Appellant 25, if there was a change requiring preclearance, it came about as a result of *Stokes*, not *Kennedy*. *Stokes* held that the 1985 Act violated the Alabama Constitution, and the State accordingly reinstated the practice of gubernatorial appointment with the Governor's 1988 appointment of Jones. *Kennedy* simply determined that the 2004 Act did not resurrect the 1985 Act; that decision itself prompted no change in the State's election practices.

County Comm'n, 502 U. S. 491, 502–503 (1992). We have also stated that the preclearance requirement encompasses "voting changes mandated by order of a state court." *Branch* v. *Smith*, 538 U. S. 254, 262 (2003). See also *Hathorn* v. *Lovorn*, 457 U. S. 255, 265–266, and n. 16 (1982). The question is whether, given the circumstances here presented, any "change" within the meaning of §5 occurred in this case.

In order to determine whether an election practice constitutes a "change" as that term is defined in our §5 precedents, we compare the practice with the covered jurisdiction's "baseline." We have defined the baseline as the most recent practice that was both precleared and "in force or effect"—or, absent any change since the jurisdiction's coverage date, the practice that was "in force or effect" on that date. See *Young*, 520 U. S., at 282–283. See also *Presley*, 502 U. S., at 495. The question is "whether a State has 'enact[ed]' or is 'seek[ing] to administer' a 'practice or procedure' that is 'different' enough" from the baseline to qualify as a change. *Young*, 520 U. S., at 281 (quoting 42 U. S. C. §1973c).[7]

For the reasons that follow, we conclude that the 1985 Act was never "in force or effect" within the meaning of §5. At all relevant times, therefore, the baseline practice for fill-

[7] By its terms, §5 requires preclearance of any election practice that is "different from that in force or effect on" the relevant coverage date—in this case, November 1, 1964. 42 U. S. C. §1973c(a). Governor Riley's opening brief suggested that this text could be read to mean that no preclearance is required if a covered jurisdiction seeks to adopt the *same* practice that was in force or effect on its coverage date—even if, because of intervening changes, that practice is different from the jurisdiction's baseline. See Brief for Appellant 26–27. In response, Kennedy and the United States noted that the DOJ, see 28 CFR §51.12 (2007), and the lower courts to consider the question, see, *e. g.*, *NAACP, DeKalb Cty. Chapter* v. *Georgia*, 494 F. Supp. 668, 677 (ND Ga. 1980) (three-judge court), have rejected this interpretation. See Brief for Appellees 47–49; Brief for United States as *Amicus Curiae* 17–18. We need not resolve this dispute because the result in this case is the same under either view. But see *post*, at 431 (taking the issue up, although it is academic here).

ing midterm vacancies on the Commission was the pre-1985 practice of gubernatorial appointment. The State's reinstatement of that practice thus did not constitute a change requiring preclearance.

A

We have directly addressed the §5 term of art "in force or effect" on three prior occasions. As will become clear, these precedents do not control this case because they differ in a critical respect. They do, however, provide the starting point for our inquiry.

In *Perkins* v. *Matthews*, 400 U. S. 379 (1971), the question was what practice had been "in force or effect" in the city of Canton, Mississippi, on that State's §5 coverage date, November 1, 1964. A 1962 state law required selection of city aldermen by at-large elections rather than by ward. Canton, however, "ignored the mandate [of the statute] in the conduct of the 1965 municipal elections and, as in 1961, elected aldermen by wards." *Id.*, at 394. In the 1969 election, the city sought to switch to at-large elections. We held that this move was a change requiring preclearance because election by ward was "the procedure *in fact* 'in force or effect' in Canton on November 1, 1964." *Id.*, at 395.

We endeavored to determine in *Perkins* the voting procedure that would have been followed on the coverage date, November 1, 1964. Two choices were apparent: the state law on the books since 1962 calling for at-large elections, or the practice Canton actually used, *without challenge*, in 1965—election by wards. We picked the 1965 practice as the more likely indicator of the practice Canton would have employed had it held an election on the coverage date, just seven months earlier. See *id.*, at 394–395.

Similarly, in *City of Lockhart* v. *United States*, 460 U. S. 125 (1983), the question was what practice had been "in force or effect" in Lockhart, Texas, on the relevant §5 coverage date, November 1, 1972. For more than 50 years, without challenge, the city had used a "numbered-post" system to

elect its city council. See *id.*, at 132, n. 6.[8] A group of plaintiffs nonetheless contended that the numbered-post system was never "in force or effect" because it lacked state-law authorization. We noted that the validity of the numbered-post system under state law was "not entirely clear." *Id.*, at 132.[9] Relying on *Perkins*, we considered the uncertain state of Texas law "irrelevant," for "[t]he proper comparison [wa]s between the new system and the system actually in effect on November 1, 1972, regardless of what state law might have required." 460 U. S., at 132 (footnote omitted).

Finally, in *Young* v. *Fordice*, decided in 1997, the question was whether a provisional voter registration plan implemented by Mississippi election officials had been "in force or effect." Believing that the state legislature was about to amend the relevant law, the officials had prepared and obtained preclearance for a new voter registration scheme. See 520 U. S., at 279. Roughly one-third of the State's election officials implemented the plan, registering around 4,000 voters. See *id.*, at 278, 283. As it turned out, however, the state legislature failed to pass the amendment, and the voters who had registered under the provisional plan were required to reregister. See *id.*, at 278. When the case reached us, we rejected the argument that "the [p]rovisional [p]lan, because it was precleared by the Attorney General, became part of the baseline against which to judge whether a future change must be precleared." *Id.*, at 282. Regarding the provisional plan as a "temporary misapplication of

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[8] Under the "numbered post" system, "the two commissioner posts were designated by number, and each candidate for commissioner specified the post for which he or she sought election." *City of Lockhart* v. *United States*, 460 U. S. 125, 127 (1983) (internal quotation marks omitted). It contrasted with an alternative system "in which all of the candidates . . . run in a single election, and the two receiving the greatest number of votes are elected." *Id.*, at 127, n. 1.

[9] We commented in this regard that the longevity of the numbered-post system "suggest[ed] a presumption of legality under state law." *Id.*, at 132, n. 6.

state law," we held that, for § 5 purposes, the plan was "never 'in force or effect.'" *Ibid.* We emphasized that the officials who implemented the provisional plan "did not intend to administer an unlawful plan" and that they abandoned it "as soon as its unlawfulness became apparent." *Id.*, at 283. We also noted that the provisional plan had been used for only 41 days and that the State "held no elections" during that period. *Ibid.*

B

Perkins and *Lockhart* established that an election practice may be "in force or effect" for § 5 purposes despite its illegality under state law if, as a practical matter, it was "actually in effect." *Lockhart*, 460 U. S., at 132. Our more recent decision in *Young*, however, qualified that general rule: A practice best characterized as nothing more than a "temporary misapplication of state law," we held, is *not* "'in force or effect,'" even if actually implemented by state election officials. 520 U. S., at 282.

If the only relevant factors were the length of time a practice was in use and the extent to which it was implemented, this would be a close case falling somewhere between the two poles established by our prior decisions. On one hand, as in *Young*, the 1985 Act was a "temporary misapplication" of state law: It was on the books for just over three years and applied as a voting practice only once. In *Lockhart*, by contrast, the city had used the numbered-post system "for over 50 years without challenge." 460 U. S., at 132, n. 6. (*Perkins* is a less clear case: The city failed to alter its practice in response to changed state law for roughly seven years, but only a single election was held during that period. See 400 U. S., at 394.) On the other hand, in *Young* no election occurred during the time the provisional registration plan was in use, while in this case one election *was* held under the later invalidated 1985 Act.

We are convinced, however, that an extraordinary circumstance not present in any past case is operative here, impel-

ling the conclusion that the 1985 Act was never "in force or effect": The Act was challenged in state court at first opportunity, the lone election was held in the shadow of that legal challenge, and the Act was ultimately invalidated by the Alabama Supreme Court.

These characteristics plainly distinguish the present case from *Perkins* and *Lockhart*. The state judiciary had no involvement in either of those cases, as the practices at issue were administered without legal challenge of any kind. And in *Lockhart*, we justified our unwillingness to incorporate a practice's legality under state law into the §5 "force or effect" inquiry in part on this ground: "We doubt[ed] that Congress intended" to require "the Attorney General and the District Court for the District of Columbia" to engage in "speculation as to state law." 460 U. S., at 133, n. 8. Here, in contrast, the 1985 Act's invalidity under the Alabama Constitution has been definitively established by the Alabama Supreme Court.

The prompt legal challenge and the Alabama Supreme Court's decision not only distinguish this case from *Perkins* and *Lockhart;* they also provide strong cause to conclude that, in the context of §5, the 1985 Act was never "in force or effect." A State's highest court is unquestionably "the ultimate exposito[r] of state law." *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975). And because the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums,[10] a law challenged at first opportunity and invalidated by Alabama's highest court is properly regarded as null and void *ab initio*, incapable of effecting any change in Alabama law or establishing a voting practice for §5 purposes. Indeed, Kennedy and the United States appear to concede that the 1985 Act would not have been "in

[10] The dissent observes that the Alabama Supreme Court's decision in *Stokes* was not unanimous. See *post*, at 436–437. Like this Court, the Alabama Supreme Court does not shy away from revealing dissenting opinions. Of course, it is the majority opinion that declares what state law is.

force or effect" had the Alabama Supreme Court stayed the 1987 election pending its decision in *Stokes* (or simply issued its decision sooner). See Brief for Appellees 51; Brief for United States as *Amicus Curiae* 23–24.

There is no good reason to hold otherwise simply because Alabama's highest court, proceeding at a pace hardly uncommon in litigated controversies, did not render its decision until after an election was held. In this regard, we have recognized that practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges. Cf. *Purcell* v. *Gonzalez*, 549 U. S. 1, 5–6 (2006) *(per curiam)* ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the [challenged] rules.").

Ruling as Kennedy and the United States urge, moreover, would have the anomalous effect of binding Alabama to an unconstitutional practice because of a state trial court's error. If the trial court had gotten the law of Alabama right, all agree, there would have been no special election and no tenable argument that the 1985 Act had ever gained "force or effect." But the trial court misconstrued the State's law and, due to that court's error, an election took place. That sequence of events, the District Court held, made the Act part of Alabama's §5 baseline. No precedent of this Court calls for such a holding.

The District Court took care to note that its decision "d[id] not in any way undermine *[Stokes* and *Kennedy]* under state law." 445 F. Supp. 2d, at 1337. In some theoretical sense, that may be true. Practically, however, the District Court's decision gave controlling effect to the erroneous trial court decision and rendered the Alabama Supreme Court's corrections inoperative. Alabama's Constitution, that State's Supreme Court determined, required that, in the years here involved, vacancies on the Mobile County Commission be filled by appointment rather than special election. Nothing

inherent in the practice of appointment violates the Fifteenth Amendment or the VRA. The DOJ, however, found that a *change* from special elections to appointment had occurred in District One, and further found that the change was retrogressive, hence barred by § 5. The District Court's final decision, tied to the DOJ determination, thus effectively precluded the State from reinstating gubernatorial appointment, the only practice consistent with the Alabama Constitution pre-2006.[11] Indeed, Kennedy's counsel forthrightly acknowledged that the position she defends would "loc[k] into place" an unconstitutional practice. Tr. of Oral Arg. 32.

The dissent, too, appears to concede that its reading of § 5 would bind Alabama to an unconstitutional practice because of an error by the state trial court. See *post*, at 435. But it contends that this imposition is no more "offensive to state sovereignty" than "effectively requiring a State to administer a law it has repealed," *post*, at 436—a routine consequence of § 5. The result described by the dissent, however, follows directly from the Constitution's instruction that a state law may not be enforced if it conflicts with federal law. See Art. VI, cl. 2. Section 5 prohibits States from making retrogressive changes to their voting practices, and thus renders any such changes unenforceable. To be sure, this result constrains States' legislative freedom. But the rule advocated by the dissent would effectively preclude Alabama's highest court from applying to a state law a provision of the State Constitution entirely harmonious with federal law. That sort of interference with a state supreme court's ability to determine the content of state law, we think it plain, is a burden of a different order.

This burden is more than a hypothetical concern. The realities of election litigation are such that lower state courts

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[11] As earlier noted, see *supra*, at 418, n. 4, the Alabama Legislature modified the relevant state law in 2006 by adopting special elections on a going-forward basis.

often allow elections to proceed based on erroneous interpretations of state law later corrected on appeal. See, *e. g.*, *Akins* v. *Secretary of State*, 154 N. H. 67, 67–68, 74, 904 A. 2d 702, 703, 708 (2006) (preelection challenge rejected by a state trial court but eventually sustained in a postelection decision by the State Supreme Court); *Cobb* v. *State Canvassing Bd.*, 2006–NMSC–034, ¶¶ 1–17, 140 N. M. 77, 79–83 (same); *Maryland Green Party* v. *Maryland Bd. of Elections*, 377 Md. 127, 137–139, 832 A. 2d 214, 220–221 (2003) (same); *O'Callaghan* v. *State*, 914 P. 2d 1250, 1263–1264 (Alaska 1996) (same); *Peloza* v. *Freas*, 871 P. 2d 687, 688, 692 (Alaska 1994) (same). We decline to adopt a rigid interpretation of "in force or effect" that would deny state supreme courts the opportunity to correct similar errors in the future.

C

Although our reasoning and the particular facts of this case should make the narrow scope of our holding apparent, we conclude with some cautionary observations. First, the presence of a judgment by Alabama's highest court declaring the 1985 Act invalid under the State Constitution is critical to our decision.[12] We do not suggest the outcome would be the same if a potentially unlawful practice had simply been abandoned by state officials after initial use in an election. Cf. *Perkins*, 400 U. S., at 395. Second, the 1985 Act was challenged the first time it was invoked and struck down shortly thereafter. The same result would not necessarily follow if a practice were invalidated only after enforcement without challenge in several previous elections. Cf. *Young*, 520 U. S., at 283 ("[T]he simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never 'in force or effect.' . . . A State, after all, might maintain in effect for many years a plan

[12] There is no indication in the record that the Alabama Supreme Court's decisions in *Stokes* and *Kennedy* were anything other than reasonable and impartial interpretations of controlling Alabama law.

that technically . . . violated some provision of state law."). Finally, the consequence of the Alabama Supreme Court's decision in *Stokes* was to reinstate a practice—gubernatorial appointment—identical to the State's §5 baseline. Preclearance might well have been required had the court instead ordered the State to adopt a novel practice.[13]

* * *

For the reasons stated, the judgment of the United States District Court for the Middle District of Alabama is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

Voting practices in Alabama today are vastly different from those that prevailed prior to the enactment of the Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 42 U. S. C. §1973 *et seq.* Even though many of those changes are, at least in part, the consequence of vigorous and sustained enforcement of the VRA, it may well be true that today the statute is maintaining strict federal controls that are not as necessary or appropriate as they once were. The principal events at issue in this case occurred in the 1980's,

[13] In view of these limitations, the concern expressed in Part IV of the dissent, see *post*, at 437–441, is misplaced. The Alabama Supreme Court's historical role in administering the State's discriminatory literacy test, the dissent contends, "indicates that state courts must be treated on the same terms as state legislatures for §5 purposes," *post*, at 437. But it is common ground that a "change" made pursuant to a state-court order is subject to §5 scrutiny; the only question is whether the Alabama Supreme Court's ruling in *Stokes* triggered a "change" within the meaning of our decisions. See *supra*, at 420–421; *post*, at 436. More importantly, none of the past discriminatory actions by the state court identified in the dissent would have been sheltered from §5 review by our tightly bounded decision in this case.

when the State's transition from a blatantly discriminatory regime was well underway.

Nevertheless, since Congress recently decided to renew the VRA,[1] and our task is to interpret that statute, we must give the VRA the same generous interpretation that our cases have consistently endorsed throughout its history. In my judgment, the Court's decision today is not faithful to those cases or to Congress' intent to give §5 of the VRA, §1973c, the "broadest possible scope," reaching "any state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 566–567 (1969). I think it clear, as the Department of Justice argues and the three-judge District Court held, 445 F. Supp. 2d 1333 (MD Ala. 2006), that the Alabama Supreme Court's decision in *Stokes* v. *Noonan*, 534 So. 2d 237 (1988), caused a change in voting practice that required preclearance.

I

Section 5 preclearance is required "[w]henever a [covered] State . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U. S. C. §1973c. The critical question in this case is whether the procedure for selecting Mobile County Commissioners arising out of *Stokes*—gubernatorial appointment—is a "change" under §5.

As an initial matter, the language of §5 requires that the practice be "different from that in force or effect on November 1, 1964." It is undisputed that the practice in force or effect in 1964 was gubernatorial appointment, see Ala. Code §12–6 (1958); the practice of calling a special election to fill midterm openings on the Mobile County Commission was not

[1] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577. The Act passed the Senate by a vote of 98 to 0. 152 Cong. Rec. S8012 (July 20, 2006).

introduced until the passage of Alabama Act No. 85–237 (1985 Act).

The argument that a return to gubernatorial appointment will never require preclearance under §5 because gubernatorial appointment was the practice in effect in 1964 is neither persuasive nor properly before the Court. Appellant expressly abandoned any such argument in his briefs to this Court. See Reply Brief 8 ("Our contention, as we have already said, is not that the Court needs to rethink prior dicta suggesting that, despite its language, §5 operates like a ratchet to subsume newly-precleared practices . . . . That question is not before the Court, and we take no position on it"). Further, appellant did not raise the argument in either of his trial briefs to the District Court. Governor's Trial Brief in *Kennedy* v. *Riley*, Civ. Action No. 2:05 CV 1100–T (MD Ala.); Governor's Supp. Trial Brief in *Kennedy* v. *Riley*, Civ. Action No. 2:05 CV 1100–T (MD Ala.).

Appellant's decision not to challenge the preclearance requirement on this ground was no doubt because of the settled law to the contrary. Reflecting the fact that Congress certainly did not intend §5 to create a "safe harbor" for voting practices identical to practices in effect in 1964, the settled understanding among lower courts and the Department of Justice is that §5 operates instead as a ratchet, freezing in place the most recent voting practice. See Brief for United States as *Amicus Curiae* 16–18 (collecting cases); 28 CFR §51.12 (2007). Furthermore, Congress has reauthorized the VRA in the face of this understanding without amending the relevant language of §5. See Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577; *ante*, at 413, n. 1 (describing the history of renewals and extensions of the VRA). Thus, the inclusion of the date 1964 in the language of §5 poses no obstacle to my conclusion that *Stokes*—even though it returned to gubernatorial practice—implemented a change in voting practice that required preclearance.

II

Whether a voting practice represents a change that requires preclearance is measured against the previously precleared "baseline" practice in force or effect. *Young* v. *Fordice*, 520 U. S. 273, 282–283 (1997); *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 495 (1992). The baseline is the practice actually in effect immediately prior to the putative change, whether or not that practice violates state law. In *Perkins* v. *Matthews*, 400 U. S. 379 (1971), for example, we held that the baseline practice was *not* at-large elections, even though at-large elections were required by a 1962 state statute. Because the city had never implemented that statute, we held that the practice actually in force or effect on November 1, 1964, was ward elections, despite that practice's illegality under state law. *Id.*, at 394–395.

The situation was similar in *City of Lockhart* v. *United States*, 460 U. S. 125 (1983). There we considered whether the practice of using numbered posts for elections was in force on the relevant coverage date and concluded that despite the possibility that this practice was illegal under Texas law, the numbered-post system could serve as the baseline. *Id.*, at 132, and n. 6. We emphasized once again that "[s]ection 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect." *Id.*, at 133.

In *Fordice*, 520 U. S. 273, our most recent case deciding whether a voting practice was a baseline under § 5, we concluded that the registration procedure at issue was not "in force or effect" and therefore could not serve as the § 5 baseline. In 1994, Mississippi began modifying its registration practices in an attempt to comply with the National Voter Registration Act of 1993, 107 Stat. 77, 42 U. S. C. § 1973gg *et seq.* In late 1994, the Mississippi secretary of state proposed a series of changes and assumed that the Mississippi Legislature would adopt those changes. The secretary of

state told at least one election official to begin registering voters under the new plan. The proposed changes were precleared, and about 4,000 voters were registered. The legislature failed to adopt the proposal, however, and the registrants were notified that they were not, as they had thought, registered to vote in state or local elections. *Fordice*, 520 U. S., at 277–278. We held that the provisional registration system was not the baseline because it was never in force or effect.

An ordinary observer asked to describe voting practice in Alabama with respect to the method of filling vacancies on the Mobile County Commission would no doubt state that before 1985 the practice was gubernatorial appointment, between 1985 and 1988 the practice was special election, and beginning in 1988 the practice changed to gubernatorial appointment.

In the face of this history, the Court comes to the startling conclusion that for purposes of the VRA Alabama has never ceased to practice gubernatorial appointment as its method of selecting members of the Mobile County Commission. But under our case law interpreting §5, it is clear that a change occurred in 1988 when *Stokes* returned Alabama to gubernatorial appointment.[2] This represented a change because the relevant baseline was the special election procedure mandated by the Alabama Legislature's enactment of the 1985 Act, which was precleared by the Department of Justice in June 1985. Pursuant to that law, the Governor called a special election when a vacancy arose in 1987. The vacancy was filled, and the newly elected commissioner took office in July 1987 serving, by way of his election, until September 1988.

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[2] Even the majority cannot escape this conclusion, stating that "[t]he State's *reinstatement* of th[e] practice [of gubernatorial appointment] did not constitute a change requiring preclearance." *Ante*, at 422 (emphasis added); see also, *e. g.*, *ante*, at 416–417, 421–422. Of course, if there was no change, then there was nothing to *reinstate*.

It is difficult to say that the special election practice was never "in force or effect" with a straight face. Jones was elected and sat on the three-member Mobile County Commission for approximately 14 months. During those 14 months, the county commission held dozens of meetings, at which the commission exercised its executive and administrative functions. During the time he served as a result of the special election, Jones was central to actions having a direct and immediate impact on Mobile County. For example, at a meeting held on October 13, 1987, the commission considered 25 agenda items, one of which was paying claims and payrolls of over $1 million. Minutes from Meeting Oct. 13, 1987.

The differences between this case and *Fordice* are legion. In holding that the provisional registration system in *Fordice* did not constitute the baseline by which to measure future practices, we emphasized that the plan was abandoned as soon as it was clear that it would not be enacted, the plan was in use for only 41 days, and only about one-third of the election officials had even implemented the proposal. 520 U. S., at 283. Further, the State rectified the situation far in advance of any elections; there was no evidence that anyone was prevented from voting because of reliance on the rejected plan. *Ibid.*

Fordice was in essence a case of "no harm, no foul." Here, of course, the special election *did take place*, and the elected commissioner held his post for 14 months, voting on hundreds of measures shaping the governance of Mobile County. While the voters in *Fordice* could be reregistered under the new procedures, Jones' election to the commission and his 14-month service cannot be undone.

The majority seems to acknowledge that *Fordice* is distinguishable, stating that if "the only relevant factors were the length of time a practice was in use and the extent to which it was implemented, this would be a close case." *Ante*, at 424. The Court relies, however, on the "extraordinary cir-

cumstance" that the 1985 Act was challenged immediately and that the 1987 election was held "in the shadow" of that legal challenge. *Ante*, at 424–425. But a cloud of litigation cannot undermine the obvious conclusion that the special election practice was in force or effect. That practice, therefore, is the practice to which gubernatorial appointment must be compared.

The majority makes much of the fact that to adopt the view of the three-judge District Court would make the question whether a voting practice is "in force or effect" turn on whether the circuit court happened to get the law right in time to stop the election. *Ante*, at 426. But the majority's approach turns instead on whether Alabama possesses highly motivated private litigants. If Stokes had not challenged the election until it had already taken place (or had failed to appeal), the election *would be* in force or effect under the majority's view. Nothing in the VRA or our cases suggests that the VRA's application should hinge on how quickly private litigants challenge voting laws.

Our decisions in *Perkins* and *Lockhart* give no indication that if a citizen in Canton, Mississippi, or Lockhart, Texas, had challenged the legality of the ward elections or the numbered-post system, the illegality of those practices under state law would have been any more relevant to their status as the relevant baselines. This case calls for nothing more than a straightforward application of our precedent; that precedent makes clear that the special election procedure was the relevant baseline and that gubernatorial appointment therefore represents a change that must be precleared.

III

The VRA makes no distinction among the paths that can lead to a change in voting practice, requiring preclearance "whenever" a State seeks to enact "any" change in voting practice. 42 U. S. C. § 1973c. And changes to voting practice can arise in at least four ways: (1) legislative enactment;

(2) executive action; (3) judicial changes, either by a proactive judicial decision (*e. g.*, redistricting) or, as in this case, through judicial interpretation of state law; or (4) informal abandonment or adoption by election officials.

The majority does not dispute that a change in voting practice wrought by a state court can be subject to preclearance. See *ante*, at 420–421 (citing *Branch* v. *Smith*, 538 U. S. 254 (2003), and *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982)). But the majority falters when it treats the change effected by *Stokes* differently for §5 preclearance purposes than it would treat a newly enacted statute or executive regulation. The majority finds it "anomalous" that Alabama might be bound "to an unconstitutional practice because of a state trial court's error." *Ante*, at 426. The clear theme running through the majority's analysis is that the Alabama Supreme Court is more deserving of comity than the Alabama Legislature.

Imagine that the 1985 Act had been held constitutional by the Alabama Supreme Court in *Stokes*, but that in 1988 the Alabama Legislature changed its mind and repealed the Act, enacting in its place a statute providing for gubernatorial appointment. Imagine further that the Department of Justice refused to preclear the practice (as it no doubt would); if Alabama wanted to fill an open seat on the Mobile County Commission it would have to administer its former special election practice even though that law had been repealed. It is not clear to me or to the United States, see Brief as *Amicus Curiae* 25–27, why effectively requiring a State to administer a law it has repealed is less offensive to state sovereignty than requiring a State to administer a law its highest court has found unconstitutional. The VRA, "by its nature, intrudes on state sovereignty." *Lopez* v. *Monterey County*, 525 U. S. 266, 284 (1999).

The majority attempts to portray the Circuit Court Judge's decision as so far outside the bounds of Alabama law,

see *ante*, at 426, that allowing it to effectively establish the special election practice as a §5 baseline would be intolerable. I am certain, however, that the two Alabama Supreme Court Justices dissenting in *Stokes* would disagree. 534 So. 2d, at 239 (opinion of Steagall, J., joined by Adams, J.). The dissenting justices argued that the 1985 Act was sufficiently "amendatory" to avoid the requirements of *Peddycoart* v. *Birmingham*, 354 So. 2d 808 (Ala. 1978), because it merely amended the 1957 Act creating the Mobile County Commission. The Circuit Court Judge followed similar reasoning, citing Alabama Supreme Court precedent stating that "[i]t is the duty of the courts to sustain the constitutionality of a legislative act unless it is clear beyond a reasonable doubt that it is in violation of the fundamental law." *Stokes* v. *Noonan*, No. CV–87–001316 (Mobile Cty., May 19, 1987). Nothing in the Circuit Court Judge's decision indicates that this case calls for anything other than a straightforward application of our precedent.

IV

Finally, the history of the voting practices that the VRA sought to address, especially in Alabama itself, indicates that state courts must be treated on the same terms as state legislatures for §5 purposes. Specifically, the history of Alabama's voter registration requirements makes this quite clear.[3] Alabama's literacy test originated in a constitutional convention called in 1901 "largely, if not principally, for the purpose of changing the 1875 Constitution so as to eliminate Negro voters." *United States* v. *Alabama*, 252 F. Supp. 95, 98 (MD Ala. 1966); see also M. McMillan, Constitutional Development in Alabama, 1789–1901, pp. 217–232 (1955);

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[3]The NAACP Legal Defense and Educational Fund's *amicus* brief provides a history of the role that Alabama courts played in promoting and retaining discriminatory voting practices.

Hunter v. *Underwood*, 471 U. S. 222 (1985).[4] Not wishing to run directly afoul of the Fifteenth Amendment, delegates at the convention devised a poll tax and a literacy test in order to disfranchise African-Americans. The effects of the new Constitution were staggering: In 1900, 100,000 African-Americans were enrolled as voters in Alabama. By 1908, only 3,742 African-Americans were registered to vote. *Alabama*, 252 F. Supp., at 99; V. Hamilton, Alabama: A Bicentennial History 96 (1977).[5]

The Alabama Constitution provided for judicial review of contested registrar decisions, see § 186 (1901), but that review provision was rendered all but useless by the Alabama Supreme Court's adoption of both a strong presumption that the Board of Registrars' decisions were valid and stringent pleading requirements. For example, in *Hawkins* v. *Vines*, 249 Ala. 165, 30 So. 2d 451 (1947), the Alabama Supreme

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[4] The spirit of the Constitution's registration provision was captured by the statement of Delegate Heflin:

"We want the white men who once voted in this State and controlled it, to vote again. We want to see that old condition restored. Upon that theory we took the stump in Alabama, having pledged ourselves to the white people of Alabama, upon the platform that we would not disfranchise a single white man, if you trust us to frame an organic law for Alabama, but it is our purpose, it is our intention, and here is our registered vow to disfranchise every negro in the State and not a single white man." 3 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901, To September 3rd 1901, p. 2844 (1941).

[5] Provisions following the lead of the 1890 "Mississippi Plan" were enacted in other State Constitutions, with similar results. See C. Zelden, The Battle for the Black Ballot 17–18 (2004) (describing similar changes to registration practice in Mississippi, South Carolina, North Carolina, Louisiana, Alabama, Virginia, Texas, and Georgia and their effects on registration); C. Woodward, Origins of the New South 1877–1913, pp. 321–349 (1951) (describing effect of Mississippi Plan on the States that adopted it). While poor white voters were also disfranchised to a significant degree, these provisions fell most heavily on African-American voters. See *id.*, at 342–343 (demonstrating that between 1897 and 1900 in Louisiana registered white voters dropped by about 40,000 and registered African-Americans dropped by approximately 125,000).

Court rejected a petition from a denial of registration because the petitioner averred that he "is a citizen of the United States," "is able to read and write," and "is over the age of twenty-one years," rather than expressly stating that he met those requirements at the time he attempted to register. *Id.*, at 169, 30 So. 2d, at 455 (emphasis deleted; internal quotation marks omitted). In *Hawkins*, the Alabama Supreme Court also reaffirmed its previous holding in *Boswell* v. *Bethea*, 242 Ala. 292, 296–297, 5 So. 2d 816, 820–821 (1942), that the decisions of the board of registrars are "presumptively regular and valid and the burden is on the one who would attack the order to show error." 249 Ala., at 169, 30 So. 2d, at 454.

Alabama's literacy test was later amended via the "Boswell Amendment" to include a requirement that voters demonstrate that they were able to "understand and explain any article of the constitution of the United States in the English language." Ala. Const. §181 (1901) (as amended in 1946 by Amdt. 55). That amendment was held to be unconstitutional in *Davis* v. *Schnell*, 81 F. Supp. 872, 881 (SD Ala. 1949). Not easily deterred, the legislature responded with a new amendment, ratified in December 1951, which provided that the Alabama Supreme Court would promulgate a uniform questionnaire to be completed by all applicants. Ala. Const. §181 (1901) (as amended in 1951 by Amdt. 91); see *United States* v. *Penton*, 212 F. Supp. 193, 204, 205 (MD Ala. 1962) (reproducing questionnaire in App. B).

During the period from 1951 to 1964, the Alabama Supreme Court rendered the questionnaire more and more complex. In 1960, in response to the efforts of African-American organizations to educate voters, the questions were arranged in different sequences for different questionnaires. B. Landsberg, Free at Last To Vote: The Alabama Origins of the 1965 Voting Rights Act 19 (2007). These new questionnaires had the effect of blocking the registration of thousands of African-American voters. For example, as a

district court in Alabama found, between 1954 and 1960 only 14 African-Americans were registered to vote in Dallas County—a county with approximately 15,000 African-Americans. See *United States* v. *Atkins*, 323 F. 2d 733, 736 (CA5 1963). Among the African-Americans denied registration were two doctors and six college graduates. *Ibid.*

The Alabama Supreme Court responded to the litigation surrounding its questionnaire by drafting a new questionnaire in 1964; that questionnaire had a literacy and civics test on which questions were rotated, resulting in 100 different forms of the test. E. Yadlosky, Library of Congress Legislative Reference Service, State Literacy Tests as Qualifications for Voting 19 (1965). The tests contained questions such as "Ambassadors may be named by the President without the approval of the United States Senate. (True or False)," and "If no person receives a majority of the electoral vote, the Vice President is chosen by the Senate. (True or False)." *Ibid.* (internal quotation marks omitted).[6] These tests were finally put to rest throughout the country in the VRA, which mandates that "[n]o citizen shall be denied, because of his failure to comply with any test or device, the right to vote." 42 U. S. C. § 1973aa.

In sum, prior to the VRA, the Alabama Supreme Court worked hand in hand with the Alabama Legislature to erect obstacles to African-American voting. While I do not wish to cast aspersions on the current members of the Alabama Supreme Court or the court that decided *Stokes* v. *Noonan*, 534 So. 2d 237, the history of the Alabama Supreme Court's role in designing Alabama's literacy test provides a vivid illustration of why voting changes wrought by state-court de-

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[6] Some of other questions were "Are post offices operated by the state or federal government?," "When residents of a city elect their officials, the voting is called a municipal election. (True or false)," "Of what political party is the president of the United States a member?," and "What is the chief executive of Alabama called?" *United States* v. *Parker*, 236 F. Supp. 511, 524, 525, 528 (MD Ala. 1964) (reproducing the questionnaire).

cisions must be treated on the same terms as those brought into effect by legislative or executive action.

V

There is simply nothing about this case that takes it outside the ordinary reach of our VRA precedents. Because the 1985 Act was precleared and put in effect during the 1987 election, the practice of special elections serves as the relevant baseline. With the correct baseline in mind, it is obvious that the gubernatorial appointment put in place by *Stokes* is a practice "different from" the baseline. Because gubernatorial appointment represents a change, it must be precleared, as the three-judge District Court correctly held.

I therefore respectfully dissent.

Syllabus

CBOCS WEST, INC. *v.* HUMPHRIES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06–1431. Argued February 20, 2008—Decided May 27, 2008

Claiming that petitioner CBOCS West, Inc., dismissed him because he is black and because he complained to managers that a black co-employee was also dismissed for race-based reasons, respondent Humphries filed suit charging that CBOCS' actions violated both Title VII of the Civil Rights Act of 1964 and 42 U. S. C. § 1981, the latter of which gives "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." The District Court dismissed the Title VII claims for failure to timely pay filing fees and granted CBOCS summary judgment on the § 1981 claims. The Seventh Circuit affirmed on the direct discrimination claim, but remanded for a trial on Humphries' § 1981 retaliation claim, rejecting CBOCS' argument that § 1981 did not encompass such a claim.

Held: Section 1981 encompasses retaliation claims. Pp. 446–457.

(a) Because this conclusion rests in significant part upon *stare decisis* principles, the Court examines the pertinent interpretive history. (1) In 1969, *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 237, as later interpreted and relied on by *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 176, recognized that retaliation actions are encompassed by 42 U. S. C. § 1982, which provides that "[a]ll citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." (2) This Court has long interpreted §§ 1981 and 1982 alike because they were enacted together, have common language, and serve the same purpose of providing black citizens the same legal rights as enjoyed by other citizens. See, *e. g.*, *Runyon* v. *McCrary*, 427 U. S. 160, 183, 197, 190. (3) In 1989, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 177, without mention of retaliation, narrowed § 1981 by excluding from its scope conduct occurring after formation of the employment contract, where retaliation would most likely be found. Subsequently, Congress enacted the Civil Rights Act of 1991, which was designed to supersede *Patterson*, see *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369, 383, by explicitly defining § 1981's scope to include post-contract-formation conduct, § 1981(b). (4) Since 1991, the Federal Courts of Appeals have uniformly interpreted § 1981 as encompassing retaliation ac-

tions. *Sullivan*, as interpreted by *Jackson*, as well as a long line of related cases where the Court construes §§ 1981 and 1982 similarly, lead to the conclusion that the view that § 1981 encompasses retaliation claims is well embedded in the law. *Stare decisis* considerations strongly support the Court's adherence to that view. Such considerations impose a considerable burden on those who would seek a different interpretation that would necessarily unsettle many Court precedents. Pp. 446–452.

(b) CBOCS' several arguments, taken separately or together, cannot justify a departure from this well-embedded interpretation of § 1981. First, while CBOCS is correct that § 1981's plain text does not expressly refer to retaliation, that alone is not sufficient to carry the day, given this Court's long recognition that § 1982 provides protection against retaliation; *Jackson*'s recent holding that Title IX of the Education Amendments of 1972 includes an antiretaliation remedy, despite Title IX's failure to use the word "retaliation," 544 U. S., at 173–174, 176; and *Sullivan*'s refusal to embrace a similar argument, see 396 U. S., at 241. Second, contrary to CBOCS' assertion, Congress' failure to include an *explicit* antiretaliation provision in its 1991 amendment of § 1981 does not demonstrate an intention not to cover retaliation, but is more plausibly explained by the fact that, given *Sullivan* and the new statutory language nullifying *Patterson*, there was no need to include explicit retaliation language. Third, the argument that applying § 1981 to employment-related retaliation actions would create an overlap with Title VII, allegedly allowing a retaliation plaintiff to circumvent Title VII's detailed administrative and procedural mechanisms and thereby undermine their effectiveness, proves too much. Precisely the same kind of Title VII/§ 1981 "overlap" and potential circumvention exists in respect to employment-related direct discrimination, yet Congress explicitly and intentionally created that overlap, *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 48–49. Fourth, contrary to its arguments, CBOCS cannot find support in *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53, 63, and *Domino's Pizza, Inc.* v. *McDonald*, 546 U. S. 470. While *Burlington* distinguished discrimination based on status (*e. g.*, as women or black persons) from discrimination based on conduct (*e. g.*, whistle-blowing that leads to retaliation), it did not suggest that Congress must separate the two in all events. Moreover, while *Domino's Pizza* and other more recent cases may place greater emphasis on statutory language than did *Sullivan*, any arguable change in interpretive approach would not justify reexamination of well-established prior law under *stare decisis* principles. Pp. 452–457.

474 F. 3d 387, affirmed.

Syllabus

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 457.

Michael W. Hawkins argued the cause for petitioner. With him on the briefs were *Michael J. Newman* and *Michael Zylstra*.

Cynthia H. Hyndman argued the cause for respondent. With her on the brief were *Aleeza M. Strubel* and *Eric Schnapper*.

Solicitor General Clement argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Assistant Attorney General Becker*, *Deputy Solicitor General Garre*, *Curtis E. Gannon*, and *Dennis J. Dimsey*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Catherine E. Stetson*, *Robin S. Conrad*, and *Shane Brennan*; and for the Equal Employment Advisory Council et al. by *Rae T. Vann*, *Karen R. Harned*, and *Elizabeth Milito*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Andrew M. Cuomo*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, and *Benjamin N. Gutman*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Richard Blumenthal* of Connecticut, *Lisa Madigan* of Illinois, *Thomas Miller* of Iowa, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Catherine Cortez Masto* of Nevada, *Anne Milgram* of New Jersey, *Marc Dann* of Ohio, *Hardy Myers* of Oregon, *William H. Sorrell* of Vermont, and *Darrell V. McGraw, Jr.*, of West Virginia; for Historian Mary Frances Berry et al. by *Melissa Hart* and *Charles J. Ogletree, Jr.*; for the Leadership Conference on Civil Rights et al. by *Paul R. Q. Wolfson*, *Anne Harkavy*, and *Michael Foreman*; for Members of Congress by *Aaron M. Panner* and *Priya R. Aiyar*; and for the National Employment Lawyers Association by *Douglas B. Huron*, *Stephen Z. Chertkof*, and *Tammany M. Kramer*.

JUSTICE BREYER delivered the opinion of the Court.

A longstanding civil rights law, first enacted just after the Civil War, provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." Rev. Stat. § 1977, 42 U. S. C. § 1981(a). The basic question before us is whether the provision encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related "right." We conclude that it does.

I

The case before us arises out of a claim by respondent, Hedrick G. Humphries, a former assistant manager of a Cracker Barrel restaurant, that CBOCS West, Inc. (Cracker Barrel's owner), dismissed him (1) because of racial bias (Humphries is a black man) and (2) because he had complained to managers that a fellow assistant manager had dismissed another black employee, Venus Green, for race-based reasons. Humphries timely filed a charge with the Equal Employment Opportunity Commission (EEOC), pursuant to 42 U. S. C. § 2000e–5, and received a "right to sue" letter. He then filed a complaint in Federal District Court charging that CBOCS' actions violated both Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and the older "equal contract rights" provision here at issue, § 1981. The District Court dismissed Humphries' Title VII claims for failure to pay necessary filing fees on a timely basis. It then granted CBOCS' motion for summary judgment on Humphries' two § 1981 claims. Humphries appealed.

The U. S. Court of Appeals for the Seventh Circuit ruled against Humphries and upheld the District Court's grant of summary judgment in respect to his direct discrimination claim. But it ruled in Humphries' favor and remanded for a

trial in respect to his § 1981 retaliation claim. In doing so, the Court of Appeals rejected CBOCS' argument that § 1981 did not encompass a claim of retaliation. 474 F. 3d 387 (2007). CBOCS sought certiorari, asking us to consider this last-mentioned legal question. And we agreed to do so. See 551 U. S. 1189 (2007).

II

The question before us is whether § 1981 encompasses retaliation claims. We conclude that it does. And because our conclusion rests in significant part upon principles of *stare decisis*, we begin by examining the pertinent interpretive history.

A

The Court first considered a comparable question in 1969, in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229. The case arose under Rev. Stat. § 1978, 42 U. S. C. § 1982, a statutory provision that Congress enacted just after the Civil War, along with § 1981, to protect the rights of black citizens. The provision was similar to § 1981 except that it focused, not upon rights to make and to enforce contracts, but rights related to the ownership of property. The statute provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." § 1982.

Paul E. Sullivan, a white man, had rented his house to T. R. Freeman, Jr., a black man. He had also assigned Freeman a membership share in a corporation, which permitted the owner to use a private park that the corporation controlled. Because of Freeman's race, the corporation, Little Hunting Park, Inc., refused to approve the share assignment. And, when Sullivan protested, the association expelled Sullivan and took away his membership shares.

Sullivan sued Little Hunting Park, claiming that its actions violated § 1982. The Court upheld Sullivan's claim.

It found that the corporation's refusal "to approve the assignment of the membership share . . . was clearly an interference with Freeman's [the black lessee's] right to 'lease.'" 396 U. S., at 237. It added that Sullivan, the white lessor, "has standing to maintain this action," *ibid.*, because, as the Court had previously said, "the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant." *Ibid.* (quoting *Barrows* v. *Jackson*, 346 U. S. 249 (1953)). The Court noted that to permit the corporation to punish Sullivan "for trying to vindicate the rights of minorities protected by § 1982" would give "impetus to the perpetuation of racial restrictions on property." 396 U. S., at 237. And this Court has made clear that *Sullivan* stands for the proposition that § 1982 encompasses retaliation claims. See *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 176 (2005) ("[I]n *Sullivan* we interpreted a general prohibition on racial discrimination [in § 1982] to cover retaliation against those who advocate the rights of groups protected by that prohibition").

While the *Sullivan* decision interpreted § 1982, our precedents have long construed §§ 1981 and 1982 similarly. In *Runyon* v. *McCrary*, 427 U. S. 160, 173 (1976), the Court considered whether § 1981 prohibits private acts of discrimination. Citing *Sullivan*, along with *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968), and *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.*, 410 U. S. 431 (1973), the Court reasoned that this case law "necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct." 427 U. S., at 173. See also *id.*, at 187 (Powell, J., concurring) ("Although *[Sullivan* and *Jones]* involved § 1982, rather than § 1981, I agree that their considered holdings with respect to the purpose and meaning of § 1982 necessarily apply to both statutes in view of their common derivation"); *id.*, at 190 (STEVENS, J., concurring) ("[I]t would be most incongruous to give those two sections [1981 and 1982] a fundamentally

different construction"). See also *Shaare Tefila Congregation* v. *Cobb*, 481 U. S. 615, 617–618 (1987) (applying to § 1982 the discussion and holding of *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 609–613 (1987), a case interpreting § 1981).

As indicated in *Runyon*, the Court has construed §§ 1981 and 1982 alike because it has recognized the sister statutes' common language, origin, and purposes. Like § 1981, § 1982 traces its origin to § 1 of the Civil Rights Act of 1866, 14 Stat. 27. See *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 383–384 (1982) (noting shared historical roots of the two provisions); *Tillman*, *supra*, at 439–440 (same). Like § 1981, § 1982 represents an immediately post-Civil War legislative effort to guarantee the then newly freed slaves the same legal rights that other citizens enjoy. See *General Building Contractors Assn.*, *supra*, at 388 (noting strong purposive connection between the two provisions). Like § 1981, § 1982 uses broad language that says "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens . . . ." Compare § 1981's language set forth above, *supra*, at 445. See *Jones*, *supra*, at 441, n. 78 (noting the close parallel language of the two provisions). Indeed, § 1982 differs from § 1981 only in that it refers, not to the "right . . . to make and enforce contracts," 42 U. S. C. § 1981(a), but to the "right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," § 1982.

In light of these precedents, it is not surprising that following *Sullivan*, federal appeals courts concluded, on the basis of *Sullivan* or its reasoning, that § 1981 encompassed retaliation claims. See, *e. g.*, *Choudhury* v. *Polytechnic Inst. of N. Y.*, 735 F. 2d 38, 42–43 (CA2 1984); *Goff* v. *Continental Oil Co.*, 678 F. 2d 593, 598–599 (CA5 1982), overruled, *Carter* v. *South Central Bell*, 912 F. 2d 832 (1990); *Winston* v. *Lear-Siegler, Inc.*, 558 F. 2d 1266, 1270 (CA6 1977).

B

In 1989, 20 years after *Sullivan*, this Court in *Patterson* v. *McLean Credit Union*, 491 U. S. 164, significantly limited the scope of § 1981. The Court focused upon § 1981's words "to make and enforce contracts" and interpreted the phrase narrowly. It wrote that the statutory phrase did not apply to "conduct by the employer *after the contract relation has been established*, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.*, at 177 (emphasis added). The Court added that the word "enforce" does not apply to post-contract-formation conduct unless the discrimination at issue "*infects the legal process* in ways that prevent one from enforcing contract rights." *Ibid.* (emphasis added). Thus § 1981 did not encompass the claim of a black employee who charged that her employer had violated her employment contract by harassing her and failing to promote her, all because of her race. *Ibid.*

Since victims of an employer's retaliation will often have opposed discriminatory conduct taking place *after* the formation of the employment contract, *Patterson*'s holding, for a brief time, seems in practice to have foreclosed retaliation claims. With one exception, we have found no federal court of appeals decision between the time we decided *Patterson* and 1991 that permitted a § 1981 retaliation claim to proceed. See, *e. g.*, *Walker* v. *South Central Bell Tel. Co.*, 904 F. 2d 275, 276 (CA5 1990) *(per curiam)*; *Overby* v. *Chevron USA, Inc.*, 884 F. 2d 470, 473 (CA9 1989); *Sherman* v. *Burke Contracting, Inc.*, 891 F. 2d 1527, 1534–1535 (CA11 1990) *(per curiam)*. See also *Malhotra* v. *Cotter & Co.*, 885 F. 2d 1305, 1312–1314 (CA7 1989) (questioning without deciding the viability of retaliation claims under § 1981 after *Patterson*). But see *Hicks* v. *Brown Group, Inc.*, 902 F. 2d 630, 635–638 (CA8 1990) (allowing a claim for discriminatory discharge to proceed under § 1981), vacated and remanded, 499 U. S. 914 (1991) (ordering reconsideration in light of what became the

Eighth Circuit's en banc opinion in *Taggart* v. *Jefferson Cty. Child Support Enforcement Unit*, 935 F. 2d 947 (1991), which held that racially discriminatory discharge claims under § 1981 are barred).

In 1991, however, Congress weighed in on the matter. Congress passed the Civil Rights Act of 1991, 105 Stat. 1071, with the design to supersede *Patterson*. *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369, 383 (2004). Insofar as is relevant here, the new law changed 42 U. S. C. § 1981 by reenacting the former provision, designating it as § 1981(a), and adding a new subsection, (b), which, says:

> "'Make and enforce contracts' defined
>
> "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

An accompanying Senate Report pointed out that the amendment superseded *Patterson* by adding a new subsection (b) that would "reaffirm that the right 'to make and enforce contracts' includes the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." S. Rep. No. 101–315, p. 6 (1990). Among other things, it would "ensure that Americans may not be harassed, *fired* or otherwise discriminated against in contracts because of their race." *Ibid.* (emphasis added). An accompanying House Report said that in "cutting back the scope of the rights to 'make' and 'enforce' contracts[,] *Patterson* . . . has been interpreted to eliminate retaliation claims that the courts had previously recognized under section 1981." H. R. Rep. No. 102–40, pt. 1, pp. 92–93, n. 92 (1991). It added that the protections that subsection (b) provided, in "the context of employment discrimination . . . would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring." *Id.*, at 92

(emphasis added). It also said that the new law "would restore rights to sue for such retaliatory conduct." *Id.*, at 93, n. 92.

After enactment of the new law, the Federal Courts of Appeals again reached a broad consensus that § 1981, as amended, encompasses retaliation claims. See, *e. g.*, *Hawkins* v. *1115 Legal Serv. Care*, 163 F. 3d 684, 693 (CA2 1998); *Aleman* v. *Chugach Support Servs., Inc.*, 485 F. 3d 206, 213–214 (CA4 2007); *Foley* v. *University of Houston System*, 355 F. 3d 333, 338–339 (CA5 2003); *Johnson* v. *University of Cincinnati*, 215 F. 3d 561, 575–576 (CA6 2000); 474 F. 3d, at 403 (case below); *Manatt* v. *Bank of America, NA*, 339 F. 3d 792, 800–801, and n. 11 (CA9 2003); *Andrews* v. *Lakeshore Rehabilitation Hospital*, 140 F. 3d 1405, 1411–1413 (CA11 1998).

The upshot is this: (1) In 1969, *Sullivan*, as interpreted by *Jackson*, recognized that § 1982 encompasses a retaliation action; (2) this Court has long interpreted §§ 1981 and 1982 alike; (3) in 1989, *Patterson*, without mention of retaliation, narrowed § 1981 by excluding from its scope conduct, namely, post-contract-formation conduct, where retaliation would most likely be found; but in 1991, Congress enacted legislation that superseded *Patterson* and explicitly defined the scope of § 1981 to include post-contract-formation conduct; and (4) since 1991, the lower courts have uniformly interpreted § 1981 as encompassing retaliation actions.

C

Sullivan, as interpreted and relied upon by *Jackson*, as well as the long line of related cases where we construe §§ 1981 and 1982 similarly, lead us to conclude that the view that § 1981 encompasses retaliation claims is indeed well embedded in the law. That being so, considerations of *stare decisis* strongly support our adherence to that view. And those considerations impose a considerable burden upon those who would seek a different interpretation that would

necessarily unsettle many Court precedents. See, *e. g.*, *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 494–495 (1987) (plurality opinion) (describing importance of *stare decisis*); *Patterson*, 491 U. S., at 172 (considerations of *stare decisis* "have special force in the area of statutory interpretation"); *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008) (same).

III

In our view, CBOCS' several arguments, taken separately or together, cannot justify a departure from what we have just described as the well-embedded interpretation of § 1981. First, CBOCS points to the plain text of § 1981—a text that says that "*/a/ll persons* . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by *white citizens*." 42 U. S. C. § 1981(a) (emphasis added). CBOCS adds that, insofar as Humphries complains of retaliation, he is complaining of a retaliatory action that the employer would have taken against him whether he was black or white, and there is no way to construe this text to cover that kind of deprivation. Thus the text's language, CBOCS concludes, simply "does not provide for a cause of action based on retaliation." Brief for Petitioner 8.

We agree with CBOCS that the statute's language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights. But that fact alone is not sufficient to carry the day. After all, this Court has long held that the statutory text of § 1981's sister statute, § 1982, provides protection from retaliation for reasons related to the *enforcement* of the express statutory right. See *supra*, at 447.

Moreover, the Court has recently read another broadly worded civil rights statute, namely, Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.*, as including an antiretaliation remedy. In

2005 in *Jackson*, the Court considered whether statutory language prohibiting "discrimination [on the basis of sex] under any education program or activity receiving Federal financial assistance," § 1681(a), encompassed claims of retaliation for complaints about sex discrimination. 544 U. S., at 173–174. Despite the fact that Title IX does not use the word "retaliation," the Court held in *Jackson* that the statute's language encompassed such a claim, in part because: (1) "Congress enacted Title IX just three years after *Sullivan* was decided"; (2) it is "'realistic to presume that Congress was thoroughly familiar'" with *Sullivan;* and (3) Congress consequently "'expected its enactment'" of Title IX "'to be interpreted in conformity with'" *Sullivan*. 544 U. S., at 176. The Court in *Jackson* explicitly rejected the arguments the dissent advances here—that *Sullivan* was merely a standing case, see *post*, at 464–467 (opinion of THOMAS, J.). Compare *Jackson*, 544 U. S., at 176, n. 1 ("*Sullivan*'s holding was not so limited. It plainly held that the white owner could maintain his *own* private cause of action under § 1982 if he could show that he was 'punished for trying to vindicate the rights of minorities'" (emphasis in original)), with *id.*, at 194 (THOMAS, J., dissenting).

Regardless, the linguistic argument that CBOCS makes was apparent at the time the Court decided *Sullivan*. See 396 U. S., at 241 (Harlan, J., dissenting) (noting the construction of § 1982 in *Jones*, 392 U. S. 409, was "in no way required by [the statute's] language"—one of the bases of Justice Harlan's dissent in *Jones*—and further contending that the Court in *Sullivan* had gone "yet beyond" *Jones*). And we believe it is too late in the day in effect to overturn the holding in that case (nor does CBOCS ask us to do so) on the basis of a linguistic argument that was apparent, and which the Court did not embrace at that time.

Second, CBOCS argues that Congress, in 1991 when it reenacted § 1981 with amendments, intended the reenacted statute *not* to cover retaliation. CBOCS rests this conclu-

sion primarily upon the fact that Congress *did not* include an *explicit* antiretaliation provision or the word "retaliation" in the new statutory language—although Congress has included explicit antiretaliation language in other civil rights statutes. See, *e. g.*, National Labor Relations Act, 29 U. S. C. § 158(a)(4); Fair Labor Standards Act of 1938, 29 U. S. C. § 215(a)(3); Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–3(a); Age Discrimination in Employment Act of 1967, 29 U. S. C. § 623(d); Americans with Disabilities Act of 1990, 42 U. S. C. §§ 12203(a)–(b); Family and Medical Leave Act of 1993, 29 U. S. C. § 2615.

We believe, however, that the circumstances to which CBOCS points find a far more plausible explanation in the fact that, given *Sullivan* and the new statutory language nullifying *Patterson*, there was no need for Congress to include explicit language about retaliation. After all, the 1991 amendments themselves make clear that Congress intended to supersede the result in *Patterson* and embrace pre-*Patterson* law. And pre-*Patterson* law included *Sullivan*. See Part II, *supra*. Nothing in the statute's text or in the surrounding circumstances suggests any congressional effort to supersede *Sullivan* or the interpretation that courts have subsequently given that case. To the contrary, the amendments' history indicates that Congress intended to restore that interpretation. See, *e. g.*, H. R. Rep. No. 102–40, at 92 (noting that § 1981(b) in the "context of employment discrimination . . . would include . . . claims of . . . retaliation").

Third, CBOCS points out that § 1981, if applied to employment-related retaliation actions, would overlap with Title VII. It adds that Title VII requires that those who invoke its remedial powers satisfy certain procedural and administrative requirements that § 1981 does not contain. See, *e. g.*, 42 U. S. C. § 2000e–5(e)(1) (charge of discrimination must be brought before EEOC within 180 days of the discriminatory act); § 2000e–5(f)(1) (suit must be filed within 90 days of obtaining an EEOC right-to-sue letter). And

CBOCS says that permitting a § 1981 retaliation action would allow a retaliation plaintiff to circumvent Title VII's "specific administrative and procedural mechanisms," thereby undermining their effectiveness. Brief for Petitioner 25.

This argument, however, proves too much. Precisely the same kind of Title VII/§ 1981 "overlap" and potential circumvention exists in respect to employment-related direct discrimination. Yet Congress explicitly created the overlap in respect to direct employment discrimination. Nor is it obvious how we can interpret § 1981 to avoid *employment*-related overlap without eviscerating § 1981 in respect to *non*-employment contracts where no such overlap exists.

Regardless, we have previously acknowledged a "necessary overlap" between Title VII and § 1981. *Patterson*, 491 U. S., at 181. We have added that the "remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 461 (1975). We have pointed out that Title VII provides important administrative remedies and other benefits that § 1981 lacks. See *id.*, at 457–458 (detailing the benefits of Title VII to those aggrieved by race-based employment discrimination). And we have concluded that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 48–49 (1974). In a word, we have previously held that the "overlap" reflects congressional design. See *ibid.* We have no reason to reach a different conclusion in this case.

Fourth, CBOCS says it finds support for its position in two of our recent cases, *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53 (2006), and *Domino's Pizza, Inc.* v. *McDonald*, 546 U. S. 470 (2006). In *Burlington*, a Title VII case, we distinguished between discrimination that harms individuals

because of "who they are, *i. e.*, their status," for example, as women or as black persons, and discrimination that harms "individuals based on what they do, *i. e.*, their conduct," for example, whistle-blowing that leads to retaliation. 548 U. S., at 63. CBOCS says that we should draw a similar distinction here and conclude that § 1981 only encompasses status-based discrimination. In *Burlington*, however, we used the status/conduct distinction to help explain why Congress might have wanted its explicit Title VII antiretaliation provision to sweep more broadly (*i. e.*, to include conduct *outside* the workplace) than its substantive Title VII (status-based) antidiscrimination provision. *Burlington* did not suggest that Congress must separate the two in all events.

The dissent argues that the distinction made in *Burlington* is meaningful here because it purportedly "underscores the fact that status-based discrimination and conduct-based retaliation are distinct harms that call for tailored legislative treatment." *Post*, at 462. The Court's construction of a general ban on discrimination such as that contained in § 1981 to cover retaliation claims, the dissent continues, would somehow render the separate antiretaliation provisions in other statutes "superfluous." *Ibid.* But the Court in *Burlington* did not find that Title VII's antiretaliation provision was redundant; it found that the provision had a broader reach than the statute's substantive provision. And in any case, we have held that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander*, *supra*, at 47. See *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 377 (1979) ("[S]ubstantive rights conferred in the 19th century [civil rights Acts] were not withdrawn, *sub silentio*, by the subsequent passage of the modern statutes"). Accordingly, the Court has accepted overlap between a number of civil rights statutes. See *ibid.* (discussing interrelation of fair housing provisions of the Civil Rights Act of 1968 and § 1982; between § 1981 and Title VII). See also *supra*,

at 455 (any overlap in reach between § 1981 and Title VII, the statute at issue in *Burlington*, is by congressional design).

CBOCS highlights the second case, *Domino's Pizza*, along with *Patterson*, and cites *Cort* v. *Ash*, 422 U. S. 66 (1975), and *Rodriguez* v. *United States*, 480 U. S. 522 (1987) *(per curiam)*, to show that this Court now follows an approach to statutory interpretation that emphasizes text. And that newer approach, CBOCS claims, should lead us to revisit the holding in *Sullivan*, an older case, where the Court placed less weight upon the textual language itself. But even were we to posit for argument's sake that changes in interpretive approach take place from time to time, we could not agree that the existence of such a change would justify reexamination of well-established prior law. Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends. See, *e. g.*, *John R. Sand & Gravel Co.*, 552 U. S., at 139.

IV

We conclude that considerations of *stare decisis* strongly support our adherence to *Sullivan* and the long line of related cases where we interpret §§ 1981 and 1982 similarly. CBOCS' arguments do not convince us to the contrary. We consequently hold that 42 U. S. C. § 1981 encompasses claims of retaliation. The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court holds that the private right of action it has implied under Rev. Stat. § 1977, 42 U. S. C. § 1981, encompasses claims of retaliation. Because the Court's holding has no

basis in the text of § 1981 and is not justified by principles of *stare decisis*, I respectfully dissent.

I

It is unexceptional in our case law that "'[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U. S. 246, 252 (2004) (quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 194 (1985)). Today, that rule is honored in the breach: The Court's analysis of the statutory text does not appear until Part III of its opinion, and then only as a potential reason to depart from the interpretation the Court has already concluded, on other grounds, must "carry the day." *Ante*, at 452. Unlike the Court, I think it best to begin, as we usually do, with the text of the statute. Section 1981(a) provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1981(a) thus guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." It is difficult to see where one finds a cause of action for retaliation in this language. On its face, § 1981(a) is a straightforward ban on racial discrimination in the making and enforcement of contracts. Not surprisingly, that is how the Court has always construed it. See, *e. g.*, *Domino's Pizza, Inc.* v. *McDonald*, 546 U. S. 470, 476 (2006) ("Section 1981 offers relief when racial discrimination blocks

the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship"); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 171 (1989) ("[Section] 1981 'prohibits racial discrimination in the making and enforcement of private contracts'" (quoting *Runyon* v. *McCrary*, 427 U. S. 160, 168 (1976))); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459 (1975) (Section 1981 "on its face relates primarily to racial discrimination in the making and enforcement of contracts").

Respondent nonetheless contends that "[t]he terms of section 1981 are significantly different, and broader, than a simple prohibition against discrimination." Brief for Respondent 15. It is true that § 1981(a), which was enacted shortly after the Civil War, does not use the modern statutory formulation prohibiting "discrimination on the basis of race." But that is the clear import of its terms. Contrary to respondent's contention, nothing in § 1981 evinces a "concer[n] with protecting individuals 'based on what they do,'" as opposed to "'prevent[ing] injury to individuals based on who they are.'" *Ibid.* (quoting *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53, 63 (2006)). Nor does § 1981 "affirmatively guarante[e]" freestanding "rights to engage in particular conduct." Brief for Respondent 16. Rather, § 1981 is an *equal-rights* provision. See *Georgia* v. *Rachel*, 384 U. S. 780, 791 (1966) ("Congress intended to protect a limited category of rights, specifically defined in terms of racial equality"). The statute assumes that "white citizens" enjoy certain rights and requires that those rights be extended equally to "[a]ll persons," regardless of their race. That is to say, it prohibits discrimination based on race.[1]

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[1] The United States, appearing as *amicus curiae* in support of respondent, contends that § 1981 prohibits not only racial discrimination, but also any other kind of "discrimination" that "impair[s]" the rights guaranteed by § 1981(a). Brief for United States 17. In support of this argument, the United States points to § 1981(c), which provides that "[t]he rights protected by this section are protected against impairment by nongovern-

Retaliation is not discrimination based on race. When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his *race;* rather, it is the result of his *conduct.* The Court recognized this commonsense distinction just two years ago in *Burlington* when it explained that Title VII's antidiscrimination provision "seeks to prevent injury to individuals based on who they are, *i. e.*, their status," whereas its "antiretaliation provision seeks to prevent harm to individuals based on what they do, *i. e.*, their conduct." 548 U. S., at 63. This distinction is sound, and it reflects the fact that a claim of retaliation is both logically and factually distinct from a claim of discrimination—logically because retaliation based on conduct and discrimination based on status are mutually exclusive categories, and factually because a claim of retaliation does not depend on proof that any status-based discrimination actually occurred. Consider, for example, an employer who fires any employee who complains of race discrimination, regardless of the employee's race.

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mental discrimination and impairment under color of State law." Thus, the argument goes, retaliation is prohibited because it is discrimination (differential treatment for those who complain) and it impairs the right granted in § 1981(a) to be free from racial discrimination in the making and enforcement of contracts (by penalizing assertion of that right).

Although I commend the United States for at least attempting to ground its position in the statutory text, its argument is unconvincing. Section 1981(c) simply codifies the Court's holding in *Runyon* v. *McCrary,* 427 U. S. 160 (1976), that § 1981 applies to private, as well as governmental, discrimination. Nothing in § 1981(c) indicates that Congress otherwise intended to expand the scope of § 1981. To the contrary, § 1981(c) refers to "[t]he rights protected by this section," *i. e.*, the rights enumerated in § 1981(a) to make and enforce contracts on the same terms as white citizens. Moreover, the word "discrimination" in § 1981(c) does not refer to "all discrimination," as the United States would have it. See Brief for United States as *Amicus Curiae* 16, n. 4. Rather, it refers back to the type of discrimination prohibited by § 1981(a), *i. e.*, discrimination based on race. Thus, § 1981 is violated only when racial discrimination impairs the right to make and enforce contracts.

Such an employer is undoubtedly guilty of retaliation, but he has not discriminated on the basis of anyone's race. Because the employer treats all employees—black and white—the same, he does not deny any employee "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[2]

The Court apparently believes that the status/conduct distinction is not relevant here because this case, unlike *Burlington*, does not require us to determine whether § 1981's supposed prohibition on retaliation "sweep[s] more broadly" than its antidiscrimination prohibition. *Ante*, at 456. That is nonsense. Although, as the Court notes, we used the status/conduct distinction in *Burlington* to explain why Title VII's antiretaliation provision must sweep more broadly than its antidiscrimination provision in order to achieve its purpose, 548 U. S., at 63–64, it does not follow that the dis-

[2] Of course, if an employer had a *different* retaliation policy for blacks and whites—firing black employees who complain of race discrimination but not firing similarly situated white employees—a black employee who was fired for complaining of race discrimination would have a promising § 1981 claim. But his claim would not sound in retaliation; rather, it would be a straightforward claim of racial discrimination. In his briefs before this Court, respondent attempts to shoehorn his claim into this category, asserting that petitioner "retaliated against [him] because he was a black worker who exercised his right" to lodge a grievance under petitioner's open-door policy. Brief for Respondent 27; see also *id.*, at 33 ("[S]ection 1981 forbids an employer from having one dismissal policy for blacks who complain about race discrimination, and another for whites who complain about such discrimination"). But respondent cites no record evidence to support his assertion that petitioner treated him differently than it would have treated a similarly situated white complainant. And while the Court of Appeals found that respondent had established a prima facie case of retaliation, 474 F. 3d 387, 406–407 (CA7 2007), it did not identify any evidence that would permit a jury to conclude that the alleged retaliation was race based. Indeed, the Court of Appeals held that respondent had "waived . . . his discrimination claim by devoting only a skeletal argument [to it] in response to [petitioner's] motion for summary judgment." *Id.*, at 407.

tinction between status and conduct is irrelevant here. To the contrary, *Burlington* underscores the fact that status-based discrimination and conduct-based retaliation are distinct harms that call for tailored legislative treatment. That is why Congress, in Title VII and a host of other statutes, has enacted separate provisions prohibiting discrimination and retaliation. See Brief for Petitioner 17–18 (citing statutes); see also *ante*, at 453–454 (same). Construing a general ban on discrimination such as that contained in § 1981 to cover retaliation would render these separate antiretaliation provisions superfluous, contrary to the normal rules of statutory interpretation.

Of course, this is not the first time I have made these points. Three Terms ago in *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167 (2005), the Court held that Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, which prohibits recipients of federal education funding from discriminating "on the basis of sex," § 1681(a), affords an implied cause of action for retaliation against those who complain of sex discrimination. In so doing, the Court disregarded the fundamental distinction between status-based discrimination and conduct-based retaliation, asserting that retaliation against those who complain of sex discrimination "is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." 544 U. S., at 174. But as I explained in my dissenting opinion in *Jackson*, "the sex-based topic of the complaint cannot overcome the fact that the retaliation is not based on anyone's sex, much less the complainer's sex." *Id.*, at 188.

Likewise here, the race-based topic of the complaint cannot overcome the fact that the retaliation is not based on anyone's race. To hold otherwise would be to ignore the fact that "protection from retaliation is separate from direct protection of the primary right [against discrimination] and serves as a prophylactic measure to guard the primary

right." *Id.*, at 189; see also *Burlington*, *supra*, at 63 (explaining that Title VII's "antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," whereas its "antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees"). In other words, "[t]o describe retaliation as discrimination on the basis of [race] is to conflate the enforcement mechanism with the right itself, something for which the statute's text provides no warrant." *Jackson*, *supra*, at 189 (THOMAS, J., dissenting).

Notably, the Court does not repeat *Jackson*'s textual analysis in this case, perhaps because no amount of repetition could make it any more plausible today than it was three years ago. Instead, the Court acknowledges that "the statute's language does not expressly refer to the claim of an individual (black or white) who suffers retaliation." *Ante*, at 452. The Court concludes, however, that the statute's failure expressly to provide a cause of action for retaliation "is not sufficient to carry the day," *ibid.*, despite our usual rule that "affirmative evidence of congressional intent must be provided for an implied remedy, . . . for without such intent the essential predicate for implication of a private remedy simply does not exist," *Alexander* v. *Sandoval*, 532 U. S. 275, 293, n. 8 (2001) (internal quotation marks omitted; emphasis deleted); see also *id.*, at 286–287 (emphasizing that, absent evidence of Congress' intent to create a cause of action, the "cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute").

Section 1981's silence regarding retaliation is not dispositive, the Court says, because "it is too late in the day" to resort to "a linguistic argument" that was supposedly rejected in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S.

229 (1969). *Ante*, at 453. As I explain below, the Court's reliance on *Sullivan* is entirely misplaced. But it also bears emphasis that the Court does not even purport to identify any basis in the statutory text for the "well-embedded interpretation of § 1981," *ante*, at 452, it adopts for the first time today. Unlike the Court, I find the statute's text dispositive. Because § 1981 by its terms prohibits only discrimination based on race, and because retaliation is not discrimination based on race, § 1981 does not provide an implied cause of action for retaliation.

II

Unable to justify its holding as a matter of statutory interpretation, the Court today retreats behind the figleaf of ersatz *stare decisis*. The Court's invocation of *stare decisis* appears to rest on three considerations: (1) *Sullivan*'s purported recognition of a cause of action for retaliation under § 1982; (2) *Jackson*'s (re)interpretation of *Sullivan;* and (3) the Courts of Appeals' view that § 1981 provides a cause of action for retaliation. None of these considerations, separately or together, justifies implying a cause of action that Congress did not include in the statute. And none can conceal the irony in the Court's novel use of *stare decisis* to decide a question of first impression.

I turn first to *Sullivan*, as it bears most of the weight in the Court's analysis. As I explained in my dissent in *Jackson*, *Sullivan* did not "hol[d] that a general prohibition against discrimination permitted a claim of retaliation," but rather "that a white lessor had standing to assert the right of a black lessee to be free from racial discrimination." 544 U. S., at 194. Thus, "[t]o make out his third-party claim on behalf of the black lessee, the white lessor would necessarily be required to demonstrate that the defendant had discriminated against the black lessee on the basis of race." *Ibid.* Here, by contrast, respondent "need not show that the [race] discrimination forming the basis of his complaints actually occurred." *Ibid.* Accordingly, as it did in *Jackson*, the

Court "creates an entirely new cause of action for a secondary rights holder, beyond the claim of the original rights holder, and well beyond *Sullivan*." *Id.*, at 194–195.

Having reexamined *Sullivan*, I remain convinced that it was a third-party standing case. Sullivan did not argue that his expulsion from the corporation—as opposed to the corporation's refusal to approve the assignment—violated § 1982. Instead, he argued that his expulsion was "contrary to public policy" because it was the "direct result of his having dealt with Freeman, as the statute requires, on a nondiscriminatory basis." Brief for Petitioners in *Sullivan* v. *Little Hunting Park, Inc.*, O. T. 1969, No. 33, p. 32. Sullivan further contended not that his own rights under § 1982 had been violated, but that he "ha[d] standing to rely on the rights of the Negro, Freeman," since he was best situated to vindicate those rights.[3] *Id.*, at 33; see also Pet. for Cert. in *Sullivan*, p. 17, n. 13 ("Although the statute declares the rights of Negroes not to be discriminated against, Sullivan, a Caucasian, has standing to rely on the invasion of the rights of others, since he is the only effective adversary capable of vindicating them in litigation arising from his expulsion" (internal quotation marks omitted)). Similarly, the United States, appearing as *amicus curiae* in support of Sullivan, argued that because "the private action involved in refusing to honor the assignment was itself illegal," "relief should be

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[3] In contrast to his argument based on § 1982, which he consistently tied to the violation of Freeman's rights, Sullivan also argued that his *own* First Amendment rights were violated:

"Since Sullivan's expulsion was in retaliation for his having obeyed the dictate of the law the expulsion was against public policy, and he should be reinstated. For the law to sanction punishment of a person such as Sullivan for refusing to discriminate against Negroes would be to render nugatory *the rights guaranteed to Negroes* by 42 U. S. C. §§ 1981, 1982 . . . . Furthermore, by giving sanction to Sullivan's expulsion, the state court deprived Sullivan of *his rights*, guaranteed by the First Amendment to criticize the conduct of the association's directors." Brief for Petitioners in *Sullivan*, p. 14 (emphasis added).

available to all persons injured by it, or as a consequence of their efforts to resist it." Brief for United States in *Sullivan*, p. 34.

Thus, both Sullivan and the United States argued that Sullivan had standing to seek relief for injuries he suffered as a result of the corporation's violation of Freeman's rights—not that Sullivan's own rights under § 1982 were violated. And that is the best interpretation of what the Court subsequently held. Tracking the parties' arguments, the Court first concluded that the corporation's "refus[al] to approve the assignment of the membership share . . . was clearly an interference with Freeman's right to 'lease' " under § 1982. 396 U. S., at 237. Only then did it conclude—based on *Barrows* v. *Jackson*, 346 U. S. 249 (1953), a third-party standing case in which another white litigant was permitted to "rely on the invasion of the rights of others," *id.*, at 255—that Sullivan "ha[d] standing to maintain this action." *Sullivan*, 396 U. S., at 237. The word "retaliation" does not appear in the Court's opinion. Nor is there any suggestion that Sullivan would have had "standing" absent the violation of Freeman's rights.

Of course, *Sullivan* is not a model of clarity, and Justice Harlan, writing in dissent, was correct to criticize the "undiscriminating manner" in which the Court dealt with Sullivan's claims. *Id.*, at 251. Sullivan had sought relief both for the corporation's refusal to approve the assignment and for his expulsion. *Id.*, at 253. But in stating that Sullivan had standing to maintain "this action," *id.*, at 237 (majority opinion), the Court did not specify what relief Sullivan was entitled to pursue on remand. Lamenting the Court's "failure to provide any guidance as to the legal standards that should govern Sullivan's right to recovery on remand," *id.*, at 252 (dissenting opinion), Justice Harlan provided an instructive summary of the ambiguities in the Court's opinion:

> "One can imagine a variety of standards, each based on different legal conclusions as to the 'rights' and 'du-

ties' created by § 1982, and each having very different remedial consequences. For example, does § 1982 give Sullivan a right to relief only for injuries resulting from Little Hunting Park's interference with *his* statutory duty to Freeman under § 1982? If so, what is Sullivan's duty to Freeman under § 1982? Unless § 1982 is read to impose a duty on Sullivan to *protest* Freeman's exclusion, he would be entitled to reinstatement under this standard only if the Board had expelled him for the simple act of assigning his share to Freeman.

"As an alternative, Sullivan might be thought to be entitled to relief from those injuries that flowed from the Board's violation of *its* 'duty' to Freeman under § 1982. Such a standard might suggest that Sullivan is entitled to damages that resulted from Little Hunting Park's initial refusal to accept the assignment to Freeman but again not to reinstatement. Or does the Court think that § 1982 gives Sullivan a right to relief from injuries that result from his 'legitimate' protest aimed at convincing the Board to accept Freeman?" *Id.*, at 254–255.

It is noteworthy that of the three possible standards Justice Harlan outlined, the first two clearly depend on a showing that Freeman's § 1982 rights were violated. Only the third—"Or does the Court think that § 1982 gives Sullivan a right to relief from injuries that result from his 'legitimate' protest"—resembles a traditional retaliation claim and, in context, even it is probably best read to presuppose that Sullivan was protesting an actual violation of Freeman's rights. *Id.*, at 255. Which, if any, of these standards the Court had in mind is anybody's guess. It did not say.

I thus adhere to my view that *Sullivan* is best read as a third-party standing case. That is how the parties argued the case, and that is the most natural reading of the Court's opinion. But even if *Sullivan* could fairly be read as having inferred a freestanding cause of action for retaliation—which I doubt it can, at least not without superimposing an anach-

ronistic outlook on a Court that was not as familiar with retaliation claims as we are today—the Court's one-paragraph discussion of the issue was, at best, both cursory and ambiguous. This is hardly the stuff of which *stare decisis* is made.

Steadfastly refusing to acknowledge any ambiguity, the Court asserts that it is "not surprising that following *Sullivan*, federal appeals courts concluded, on the basis of *Sullivan* or its reasoning, that § 1981 encompassed retaliation claims." *Ante*, at 448. But given *Sullivan*'s use of the word "standing" and its reliance on a third-party standing case, what is unsurprising is that each of the cases the Court cites either characterized the issue as one of standing, *Winston* v. *Lear-Siegler, Inc.*, 558 F. 2d 1266, 1270 (CA6 1977) (characterizing the issue as "whether or not the white plaintiff in this action has standing to sue his former employer under 42 U. S. C. § 1981 for discharging him in alleged retaliation for plaintiff's protesting the alleged discriminatory firing of a black co-worker"), or recognized that it was taking a step beyond *Sullivan* in inferring a cause of action for retaliation, *Choudhury* v. *Polytechnic Inst. of N. Y.*, 735 F. 2d 38, 42 (CA2 1984) (stating that the Second Circuit "ha[d] never decided whether § 1981 creates a cause of action for retaliation," even though it had previously held, based on *Sullivan*, "that a white person who claimed to have suffered reprisals as a result of his efforts to vindicate the rights of non-whites had standing to sue under § 1981"); *Goff* v. *Continental Oil Co.*, 678 F. 2d 593, 598, n. 7 (CA5 1982) (recognizing that *Sullivan* and a previous Fifth Circuit decision relying on *Sullivan* were "essentially standing cases holding that white people can assert civil rights claims when they are harmed by someone's discrimination against blacks," which is distinct from holding that "a particular type of conduct—retaliation for the filing of a § 1981 law suit—is actionable in the first place").

Moreover, even if *Sullivan* had squarely and unambiguously held that § 1982 provides an implied cause of action for

retaliation, it would have been wrong to do so because § 1982, like § 1981, prohibits only discrimination based on race, and retaliation is not discrimination based on race.[4] The question, then, would be whether to extend *Sullivan*'s erroneous interpretation of § 1982 to § 1981. The Court treats this as a foregone conclusion because "our precedents have long construed §§ 1981 and 1982 similarly." *Ante*, at 447. But erroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep.[5] Otherwise, *stare decisis*,

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[4] The majority claims that *Sullivan* "did not embrace" this "linguistic argument." *Ante*, at 453. That is because the argument was not before the Court. The corporation did not argue that § 1982's text could not reasonably be construed to create a cause of action for retaliation; nor did Justice Harlan in dissent. No one made this argument because that was not how the issue was framed, either by Sullivan or by the Court. The majority suggests that the argument was "apparent at the time the Court decided *Sullivan*." *Ibid.* But the only evidence it cites is Justice Harlan's observation that the Court's holding in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968), that § 1982 prohibits private as well as governmental discrimination was "in no way required by [§ 1982's] language." *Sullivan*, 396 U. S., at 241 (dissenting opinion). I fail to see how that observation—or Justice Harlan's further observation that the Court in *Sullivan* had gone "yet beyond *Jones*," *ibid.*—shows that the Court considered and rejected the entirely different argument that § 1982's text does not provide a cause of action for retaliation.

[5] For example, we have refused to extend the holding of *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), which inferred a private right of action for violations of § 14(a) of the Securities Exchange Act of 1934, to other sections of the Act. *Borak* applied the understanding—later abandoned in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975)—that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. 377 U. S., at 433. As Chief Judge Easterbrook explained in dissent below, the analogy to the present case is obvious:

"The argument goes that, because *Sullivan* ignored the language of § 1982 and drafted an 'improved' version of the statute, we are free to do the same today for § 1981, its neighbor. The Supreme Court requires us to proceed otherwise. *Borak* dealt with § 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a). It was as freewheeling in 'interpreting'

designed to be a principle of stability and repose, would become a vehicle of change whereby an error in one area metastasizes into others, thereby distorting the law. Two wrongs do not make a right, and an aesthetic preference for symmetry should not prevent us from recognizing the true meaning of an Act of Congress.

The Court's remaining reasons for invoking *stare decisis* require little discussion. First, the Court relies on the fact that *Jackson* interpreted *Sullivan* as having recognized a cause of action for retaliation under § 1982. See *ante*, at 447, 452–453. That is true but irrelevant. It was only through loose language and creative use of brackets that *Jackson* was able to assert that *Sullivan* "upheld Sullivan's cause of action under 42 U. S. C. § 1982 for '[retaliation] for the advocacy of [the black person's] cause.'" 544 U. S., at 176 (quoting *Sullivan*, 396 U. S., at 237; brackets in original). Of course, *Sullivan* did not use the word "retaliation," did not say anything about a "cause of action," and did not state that Sullivan had rights under § 1982. It most certainly did not "interpre[t] a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Jackson*, 544 U. S., at 176. *Jackson*'s assertion that *Sullivan* "plainly held that the white owner could maintain his *own* private cause of

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that law as *Sullivan* was with § 1982. Yet the Court has held that the change of interpretive method announced in *Cort* applies to all other sections of the Securities Exchange Act. See *Piper v. Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977) (§ 14(e)); *Touche Ross & Co. v. Redington*, 442 U. S. 560 (1979) (§ 17(a)). *Borak* and similar decisions from the 1960s have not been overruled, but we have been told in no uncertain terms that they must not be extended. Indeed, in *Virginia Bankshares, Inc. v. Sandberg*, 501 U. S. 1083 (1991), the Court declined to apply *Borak* to a portion of § 14(a) that had not been involved in *Borak*. So that case has been limited to a single sentence of one subsection. Why, then, may the method of *Sullivan* be applied to other sections of the Civil Rights Act of 1866 despite intervening precedent?" 474 F. 3d, at 410–411 (some citations omitted).

action under § 1982," 544 U. S., at 176, n. 1, misses the point entirely. While *Sullivan* held that "the white owner" had standing to maintain his own *suit*, it said nothing to suggest that he could sue to vindicate his own *right* to be free from retaliation under § 1982. Rather, as I have explained, Sullivan's "standing" was derivative of the violation of Freeman's rights. In short, *Jackson*'s characterization of *Sullivan* was erroneous, and I am aware of no principle of *stare decisis* that requires us to give decisive weight to a precedent's erroneous characterization of another precedent—particularly where, as here, the cases involved different statutes, neither of which was the statute at issue in the case at bar.

Second, the Court appears to give weight to the fact that, since Congress passed the Civil Rights Act of 1991, 105 Stat. 1071, "the lower courts have uniformly interpreted § 1981 as encompassing retaliation actions." *Ante*, at 451. This rationale fares no better than the others. The Court has never suggested that rejection of a view uniformly held by the courts of appeals violates some principle of *stare decisis*. To the contrary, we have not hesitated to take a different view if convinced the lower courts were wrong. Indeed, it has become something of a dissenter's tactic to point out that the Court has decided a question differently than every court of appeals to have considered it. See, *e. g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 278, n. 11 (2003) (THOMAS, J., concurring in part, concurring in result in part, concurring in judgment in part, and dissenting in part); *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 643 (2001) (GINSBURG, J., dissenting); *Sandoval*, 532 U. S., at 294 (STEVENS, J., dissenting); *Jones* v. *United States*, 526 U. S. 227, 254 (1999) (KENNEDY, J., dissenting); *McNally* v. *United States*, 483 U. S. 350, 365 (1987) (STEVENS, J., dissenting). The Court does not explain what makes this particular line of lower court authority any more sacrosanct than those we have rejected in the past.

Of course, lower court decisions may be persuasive, and when the Court rejects the unanimous position of the courts of appeals, it is fair to point out that fact. But the point has traction only to the extent it tends to show that the Court's reasoning is flawed on the merits, as demonstrated by the number of judges who have reached the opposite conclusion. See, *e. g.*, *Buckhannon*, *supra*, at 643–644 (GINSBURG, J., dissenting) ("When this Court rejects the considered judgment prevailing in the Circuits, respect for our colleagues demands a cogent explanation"). Unlike decisions of this Court, decisions of the courts of appeals, even when unanimous, do not carry *stare decisis* weight, nor do they relieve us of our obligation independently to decide the merits of the question presented. That is why, when we have affirmed a view unanimously held by the courts of appeals, we have done so (at least until today) not because we gave precedential weight to the lower courts' decisions, but because we agreed with their resolution of the question on the merits. See, *e. g.*, *Gonzalez* v. *Crosby*, 545 U. S. 524, 531 (2005) ("Virtually every Court of Appeals to consider the question has held that such a pleading . . . is in substance a successive habeas petition . . . . We think those holdings are correct"); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 362 (1991) ("Thus, we agree with every Court of Appeals that has been called upon to apply a federal statute of limitations to a § 10(b) claim").

III

As in *Jackson*, "[t]he question before us is only whether [§ 1981] prohibits retaliation, not whether prohibiting it is good policy." 544 U. S., at 195 (THOMAS, J., dissenting). "By crafting its own additional enforcement mechanism, the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose." *Ibid.* That the Court does so under the guise of *stare decisis* does not make its decision any more

justifiable. Because the text of § 1981 provides no basis for implying a private right of action for retaliation, and because no decision of this Court holds to the contrary, I would reverse the judgment below.

Syllabus

GOMEZ-PEREZ *v.* POTTER, POSTMASTER GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 06–1321. Argued February 19, 2008—Decided May 27, 2008

Petitioner, a 45-year-old postal worker, filed suit claiming that her employer had violated the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §633a(a)—which requires that "[a]ll personnel actions affecting employees . . . at least 40 years of age . . . be made free from any discrimination based on age"—by subjecting her to various forms of retaliation after she filed an administrative ADEA complaint. The District Court granted respondent summary judgment. The First Circuit affirmed on the ground that §633a(a)'s prohibition of "discrimination based on age" does not cover retaliation.

Held: Section 633a(a) prohibits retaliation against a federal employee who complains of age discrimination. Pp. 479–491.

(a) In so concluding, the Court follows the reasoning of two prior decisions ruling that retaliation is covered by similar language in other antidiscrimination statutes. First, in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 237, the Court held that a retaliation claim could be brought under 42 U. S. C. §1982, which provides that "[a]ll citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." While §1982 does not use the phrase "discrimination based on race," that is its plain meaning. See, *e. g.*, *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 177. Second, the *Jackson* Court, *id.*, at 173–174, relied on *Sullivan* in holding that Title IX of the Education Amendments of 1972, 20 U. S. C. §1681(a), which prohibits "discrimination" "on the basis of sex" in educational programs receiving federal aid, reached retaliation against a public school teacher for complaining about sex discrimination in his school's athletic program. 544 U. S., at 176–177. The ADEA language at issue ("discrimination based on age") is not materially different from the language at issue in *Jackson* and is the functional equivalent of the language at issue in *Sullivan*, see *Jackson*, *supra*, at 177. And the context in which the statutory language appears is the same in all three cases: remedial provisions aimed at prohibiting discrimination. Respondent neither asks the Court to overrule *Sullivan* or *Jackson* nor questions those decisions' reasoning, and the Government, both in *Jackson* and in *CBOCS West, Inc.* v. *Humphries*,

Syllabus

ante, p. 442, has specifically urged the Court to follow *Sullivan*'s reasoning. Pp. 479–482.

(b) The three grounds on which the First Circuit sought to distinguish *Jackson* in support of the Circuit's perception that there is a clear difference between causes of action for discrimination and for retaliation are not persuasive. Pp. 482–485.

(1) The Circuit places too much reliance on the fact that the ADEA expressly creates a private right of action, whereas the right of action under Title IX, the statute at issue in *Jackson*, is implied and not express, see *Cannon* v. *University of Chicago*, 441 U. S. 677. The assertion that this distinction allowed the *Jackson* Court greater leeway to adopt an expansive interpretation of Title IX improperly conflates the analytically distinct questions whether a statute confers a private right of action and whether the statute's substantive prohibition reaches a particular form of conduct. Moreover, confusing these questions would lead to exceedingly strange results. For example, Title IX's prohibition of "discrimination" "on the basis of sex" either does or does not reach retaliation, and the presence or absence of another statutory provision expressly creating a private right of action cannot alter §1681(a)'s scope. Pp. 482–483.

(2) Also unavailing is the Circuit's attempt to distinguish *Jackson* on the ground that retaliation claims play a more important role under Title IX than under the ADEA. This argument ignores the basis for *Jackson*, which did not hold that Title IX prohibits retaliation because such claims are important as a policy matter, but, instead, relied on an interpretation of the "text of Title IX." 544 U. S., at 173, 178. *Jackson*'s statement that "teachers . . . are often in the best position to vindicate [student] rights," *id.*, at 181, did not address the question whether the statutory term "discrimination" encompasses retaliation, but was made in response to the school board's argument that only a "victim of the discrimination," not third parties, should be allowed to assert a retaliation claim, *id.*, at 179–182. P. 484.

(3) Finally, the Circuit's attempt to distinguish *Jackson* on the ground that Title IX was adopted in response to *Sullivan*, whereas there is no evidence in the ADEA's legislative history that §633a was adopted in a similar context, is rejected. *Jackson* did not identify any legislative history evidence, but merely observed that because "Congress enacted Title IX just three years after *Sullivan*," it was " 'realistic to presume that Congress was thoroughly familiar with *[Sullivan]* and . . . expected [Title IX] to be interpreted in conformity with [it]." 544 U. S., at 176. What *Jackson* said about the relationship between *Sullivan* and Title IX's enactment can also be said about the relationship between *Sullivan* and §633a's enactment, since the latter provision

was enacted just five years after *Sullivan* was decided and two years after Title IX was enacted. Pp. 484–485.

(c) Respondent's other arguments supporting the contention that §633a(a) does not encompass retaliation claims are rejected. Pp. 486–491.

(1) Respondent places too much reliance on the presence of an ADEA provision specifically prohibiting retaliation against individuals complaining about private-sector age discrimination, §623(d), and the absence of a similar provision in §633a. Because §§623 and 633a were enacted seven years apart rather than simultaneously, see *Lindh* v. *Murphy*, 521 U. S. 320, 330, and because they are couched in very different terms—with §§623(a)(1)–(3) listing specific forbidden employer practices in contrast to §633a(a)'s broad prohibition of "discrimination"—the absence of a federal-sector provision similar to §623(d) does not provide a sufficient reason to depart from *Sullivan* and *Jackson*. Pp. 486–488.

(2) There is even less merit in respondent's reliance on §633a(f), which provides that personnel actions by a federal entity covered by §633a "shall not be subject to, or affected by, any provision of this chapter" other than §633a and §631(b), which restricts ADEA coverage to persons at least 40 years old. Respondent's contention that recognizing federal-sector retaliation claims would make §623(d) applicable to federal-sector employers in contravention of §633a(f) is unsound because the Court's holding today is not based on §623(d) but on §633a(a) itself, "unaffected by other [ADEA] sections," *Lehman* v. *Nakshian*, 453 U. S. 156, 168. Pp. 488–489.

(3) Also unavailing is respondent's argument that the history of congressional and Executive Branch responses to discrimination in federal employment demonstrates that when Congress enacted §633a, it anticipated that the pre-existing reprisal regulations of the Civil Service Commission (CSC) would be extended to cover federal-sector age discrimination and be the exclusive avenue for asserting retaliation claims. This argument is not supported by direct evidence, but rests on unsupported speculation, and, in any event, is self-contradictory in that, if §633a(a) does not confer an antiretaliation right, there is no reason to assume that Congress expected the CSC to issue new regulations prohibiting retaliation. Pp. 489–490.

(4) Respondent's final argument—that sovereign immunity principles require that §633a(a) be read narrowly as prohibiting substantive age discrimination but not retaliation—is unpersuasive. The rule of construction requiring that "[a] waiver of the Federal Government's sovereign immunity . . . be unequivocally expressed in statutory text" and "strictly construed . . . in favor of the sovereign," *Lane* v. *Peña*, 518 U. S. 187, 192, is satisfied here by §633a(c), which unequivocally waives

sovereign immunity for a claim brought by "[a]ny person aggrieved" by a §633a violation. Unlike §633a(c), §633a(a) is not a waiver of sovereign immunity; it is a substantive provision outlawing "discrimination." That the §633a(c) waiver applies to §633a(a) claims does not mean that §633a(a) must surmount the same high hurdle as §633a(c). Pp. 490–491.

476 F. 3d 54, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined as to all but Part I, *post*, p. 492. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 506.

Joseph R. Guerra argued the cause for petitioner. With him on the briefs were *Virginia A. Seitz*, *Ileana M. Ciobanu*, *Richard A. Kaplan*, and *Edelmiro A. Salas*.

Deputy Solicitor General Garre argued the cause for respondent. With him on the brief were *Solicitor General Clement*, *Acting Assistant Attorney General Bucholtz*, *Anthony A. Yang*, *Marleigh D. Dover*, and *August E. Flentje*.*

JUSTICE ALITO delivered the opinion of the Court.

The question before us is whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), as added, 88 Stat. 74, and amended, 29 U. S. C. §633a(a). We hold that such a claim is authorized.

I

Petitioner Myrna Gómez-Pérez was a window distribution clerk for the United States Postal Service. In October 2002, petitioner, then 45 years of age, was working full time at the Post Office in Dorado, Puerto Rico. She requested a trans-

*Briefs of *amici curiae* urging reversal were filed for AARP by *Daniel B. Kohrman* and *Melvin R. Radowitz*; and for the National Treasury Employees Union by *Gregory O'Duden*, *Elaine D. Kaplan*, *Barbara A. Atkin*, and *Robert H. Shriver III*.

fer to the Post Office in Moca, Puerto Rico, in order to be closer to her mother, who was ill. The transfer was approved, and in November 2002, petitioner began working at the Moca Post Office in a part-time position. Later that month, petitioner requested a transfer back to her old job at the Dorado Post Office, but her supervisor converted the Dorado position to part-time, filled it with another employee, and denied petitioner's application.

After first filing an unsuccessful union grievance seeking a transfer back to her old job, petitioner filed a Postal Service equal employment opportunity age discrimination complaint. According to petitioner, she was then subjected to various forms of retaliation. Specifically, petitioner alleges that her supervisor called her into meetings during which groundless complaints were leveled at her, that her name was written on anti-sexual-harassment posters, that she was falsely accused of sexual harassment, that her co-workers told her to "'go back'" to where she "'belong[ed],'" and that her work hours were drastically reduced. 476 F. 3d 54, 56 (CA1 2007).

Petitioner responded by filing this action in the United States District Court for the District of Puerto Rico, claiming, among other things, that respondent had violated the federal-sector provision of the ADEA, 29 U. S. C. §633a(a), by retaliating against her for filing her equal employment opportunity age discrimination complaint. Respondent moved for summary judgment, arguing that the United States has not waived sovereign immunity for ADEA retaliation claims and that the ADEA federal-sector provision does not reach retaliation. The District Court granted summary judgment in favor of respondent on the basis of sovereign immunity.

On appeal, the United States Court of Appeals for the First Circuit held that the Postal Reorganization Act, 39 U. S. C. §401(1), unequivocally waived the Postal Service's sovereign immunity, see 476 F. 3d, at 54, 57, but the court

affirmed the decision of the District Court on the alternative ground that the federal-sector provision's prohibition of "discrimination based on age," §633a(a), does not cover retaliation, *id.*, at 60, creating a split among the Courts of Appeals. Cf. *Forman* v. *Small*, 271 F. 3d 285, 296 (CADC 2001) (ADEA federal-sector provision covers retaliation). We granted certiorari. 551 U. S. 1188 (2007).

II

The federal-sector provision of the ADEA provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." §633a(a). The key question in this case is whether the statutory phrase "discrimination based on age" includes retaliation based on the filing of an age discrimination complaint. We hold that it does.

In reaching this conclusion, we are guided by our prior decisions interpreting similar language in other antidiscrimination statutes. In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969), we considered whether a claim of retaliation could be brought under Rev. Stat. §1978, 42 U. S. C. §1982, which provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." While §1982 does not use the phrase "discrimination based on race," that is its plain meaning. See *Tennessee* v. *Lane*, 541 U. S. 509, 561 (2004) (SCALIA, J., dissenting) (describing §1982 as "banning public or private racial discrimination in the sale and rental of property"); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

In *Sullivan*, a white man (Sullivan) held membership shares in a nonstock corporation that operated a park and playground for residents of the area in which he owned a home. Under the bylaws of the corporation, a member who leased a home in the area could assign a membership share

in the corporation. But when Sullivan rented his house and attempted to assign a membership share to an African-American (Freeman), the corporation disallowed the assignment because of Freeman's race and subsequently expelled Sullivan from the corporation for protesting that decision. Sullivan sued the corporation, and we held that his claim that he had been expelled "for the advocacy of Freeman's cause" was cognizable under § 1982. 396 U. S., at 237. A contrary holding, we reasoned, would have allowed Sullivan to be "punished for trying to vindicate the rights of minorities" and would have given "impetus to the perpetuation of racial restrictions on property." *Ibid.*

More recently, in *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167 (2005), we relied on *Sullivan* in interpreting Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* Jackson, a public school teacher, sued his school board under Title IX, "alleging that the Board retaliated against him because he had complained about sex discrimination in the high school's athletic program." 544 U. S., at 171. Title IX provides in relevant part that "[n]o person in the United States shall, *on the basis of sex*, . . . be subjected to *discrimination* under any education program or activity receiving Federal financial assistance." § 1681(a) (emphasis added). Holding that this provision prohibits retaliation, we wrote:

> "Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination . . . . Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes inten-

> tional 'discrimination' 'on the basis of sex,' in violation of Title IX." *Id.*, at 173–174 (citations omitted).

This interpretation, we found, flowed naturally from *Sullivan:* "Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the basis of sex,' just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race." 544 U. S., at 176–177.

Following the reasoning of *Sullivan* and *Jackson*, we interpret the ADEA federal-sector provision's prohibition of "discrimination based on age" as likewise proscribing retaliation. The statutory language at issue here ("discrimination based on age") is not materially different from the language at issue in *Jackson* ("'discrimination'" "'on the basis of sex'") and is the functional equivalent of the language at issue in *Sullivan*, see *Jackson*, *supra*, at 177 (describing *Sullivan* as involving "discrimination on the basis of race"). And the context in which the statutory language appears is the same in all three cases; that is, all three cases involve remedial provisions aimed at prohibiting discrimination.

The *Jackson* dissent strenuously argued that a claim of retaliation is conceptually different from a claim of discrimination, see 544 U. S., at 184–185 (opinion of THOMAS, J.), but that view did not prevail.[1] And respondent in this case does not ask us to overrule *Sullivan* or *Jackson*. Nor does re-

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[1] Suggesting that we have retreated from the reasoning of *Sullivan* and *Jackson*, THE CHIEF JUSTICE, citing *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53, 63–65 (2006), states that "we have since explained that antidiscrimination and antiretaliation provisions are indeed conceptually distinct, and serve distinct purposes." *Post*, at 495 (dissenting opinion). But as the Court explains today in *CBOCS West, Inc.* v. *Humphries*, *ante*, at 456, "[i]n *Burlington* . . . we used the status/conduct distinction to help explain why Congress might have wanted its explicit Title VII antiretaliation provision to sweep more broadly (*i. e.*, to include conduct *outside* the workplace) than its substantive Title VII (status-based) antidiscrimination provision. *Burlington* did not suggest that Congress must separate the two in all events."

spondent question the reasoning of those decisions. Indeed, in *Jackson*, the Government contended that "[t]he text . . . of Title IX demonstrate[s] that it encompasses protection against retaliation" since "retaliation against a person because that person has filed a sex discrimination complaint is a form of intentional sex discrimination." Brief for United States as *Amicus Curiae* in *Jackson* v. *Birmingham Bd. of Ed.*, O. T. 2004, No. 02–1672, p. 8. Similarly, in another case this Term, the Government has urged us to follow the reasoning of *Sullivan* and to hold that a claim of retaliation may be brought under Rev. Stat. § 1977, 42 U. S. C. § 1981. In that case, the Government argues that § 1981's prohibition of "'discrimination' . . . quite naturally includes discrimination on account of having complained about discrimination." Brief for United States as *Amicus Curiae* in *CBOCS West, Inc.* v. *Humphries*, O. T. 2007, No. 06–1431, p. 10.

III

The decision of the Court of Appeals, which respondent defends, perceived a "clear difference between a cause of action for discrimination and a cause of action for retaliation" and sought to distinguish *Jackson* on three grounds. 476 F. 3d, at 58–59. We are not persuaded, however, by any of these attempted distinctions.

A

The Court of Appeals first relied on the fact that the ADEA expressly creates a private right of action whereas Title IX, the statute at issue in *Jackson*, does not. See 476 F. 3d, at 58. The Court of Appeals appears to have reasoned that, because the private right of action under Title IX is implied and not express, see *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), the *Jackson* Court had greater leeway to adopt an expansive interpretation of Title IX's prohibition of discrimination on the basis of sex.

This reasoning improperly conflates the question whether a statute confers a private right of action with the question whether the statute's substantive prohibition reaches a particular form of conduct. These questions are analytically distinct, and confusing them would lead to exceedingly strange results.

For example, under the Court of Appeals' reasoning, Title IX's prohibition of "discrimination" "on the basis of sex," in 20 U. S. C. § 1681(a), might have a narrower scope and might not reach retaliation if Title IX contained a provision expressly authorizing an aggrieved private party to bring suit to remedy a violation of § 1681(a). We do not see how such a conclusion could be defended. Section 1681(a)'s prohibition of "discrimination" either does or does not reach retaliation, and the presence or absence of another statutory provision expressly creating a private right of action cannot alter § 1681(a)'s scope. In addition, it would be perverse if the enactment of a provision explicitly creating a private right of action—a provision that, if anything, would tend to suggest that Congress perceived a need for a strong remedy—were taken as a justification for narrowing the scope of the underlying prohibition.

The Court of Appeals' reasoning also seems to lead to the strange conclusion that, despite *Jackson*'s holding that a private party may assert a retaliation claim under Title IX, the Federal Government might not be authorized to impose upon an entity that engages in retaliation the administrative remedies, including the termination of funding, that are expressly sanctioned under § 1682. It would be extremely odd, however, if § 1681(a) had a broader scope when enforced by a means not expressly sanctioned by statute than it does when enforced by the means that the statute explicitly provides. For these reasons, we reject the proposition that *Jackson* may be distinguished from the present case on the ground that Title IX's private right of action is implied.

B

The Court of Appeals next attempted to distinguish *Jackson* on the ground that retaliation claims play a more important role under Title IX than they do under the ADEA. The Court of Appeals pointed to our statement in *Jackson* that "'teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.'" 476 F. 3d, at 58 (quoting *Jackson*, 544 U. S., at 181). The Court of Appeals suggested that third parties are not needed to "identify instances of age discrimination and bring it to the attention of supervisors" and that, consequently, there is no need to extend §633a(a) to reach retaliation. 476 F. 3d, at 58.

This argument ignores the basis for the decision in *Jackson*. *Jackson* did not hold that Title IX prohibits retaliation because the Court concluded as a policy matter that such claims are important. Instead, the holding in *Jackson* was based on an interpretation of the "text of Title IX." 544 U. S., at 173, 178.

Moreover, the statements in *Jackson* on which the Court of Appeals relied did not address the question whether the statutory term "discrimination" encompasses retaliation. Instead, those statements addressed the school board's argument that, even if Title IX was held to permit some retaliation claims, only a "victim of the discrimination"—and not third parties—should be allowed to assert such a claim. *Id.*, at 179–182. It was in response to this argument that the Court noted the particular importance of reports of Title IX violations by third parties such as teachers and coaches. *Id.*, at 181.

C

Finally, the Court of Appeals attempted to distinguish *Jackson* on the ground that "Title IX was adopted in re-

sponse to the Court's holding in *Sullivan*," whereas "there is no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context." 476 F. 3d, at 58–59. *Jackson*'s reliance on *Sullivan*, however, did not stem from "evidence in the legislative history" of Title IX. *Jackson* did not identify any such evidence but merely observed that "Congress enacted Title IX just three years after *Sullivan* was decided." 544 U. S., at 176. Due to this chronology, the Court concluded, it was "'not only appropriate but also realistic to presume that Congress was thoroughly familiar with *[Sullivan]* and that it expected its enactment [of Title IX] to be interpreted in conformity with [it]." *Ibid.* (quoting *Cannon*, 441 U. S., at 699). See also 544 U. S., at 176 ("Title IX was enacted in 1972, three years after *[Sullivan]*"); *id.*, at 179–180 ("*Sullivan* . . . formed an important part of the backdrop against which Congress enacted Title IX").

What *Jackson* said about the relationship between *Sullivan* and the enactment of Title IX can be said as well about the relationship between *Sullivan* and the enactment of the ADEA's federal-sector provision, 29 U. S. C. §633a. *Sullivan* was decided in 1969 and §633a was enacted in 1974—five years after the decision in *Sullivan* and two years after the enactment of Title IX. We see no reason to think that Congress forgot about *Sullivan* during the two years that passed between the enactment of Title IX in 1972 and the enactment of §633a in 1974. And if, as *Jackson* presumed, Congress had *Sullivan* in mind when it enacted Title IX in 1972, it is "appropriate" and "realistic" to presume that Congress expected its prohibition of "discrimination based on age" in §633a(a) "'to be interpreted in conformity with'" its similarly worded prohibition of "discrimination" "on the basis of sex" in 20 U. S. C. §1681(a), which it had enacted just two years earlier. 544 U. S., at 176 (quoting *Cannon*, *supra*, at 699).

IV

A

In arguing that §633a(a) does not encompass retaliation claims, respondent relies principally on the presence of a provision in the ADEA specifically prohibiting retaliation against individuals who complain about age discrimination in the private sector, §623(d), and the absence of a similar provision specifically prohibiting retaliation against individuals who complain about age discrimination in federal employment. According to respondent, "the strong presumption is that [the] omission reflects that Congress acted intentionally and purposely in including such language in Section 623 of the Act and excluding it from Section 633a." Brief for Respondent 17 (internal quotation marks omitted).

"[N]egative implications raised by disparate provisions are strongest" in those instances in which the relevant statutory provisions were "considered simultaneously when the language raising the implication was inserted." *Lindh* v. *Murphy*, 521 U. S. 320, 330 (1997). Here, the two relevant provisions were not considered or enacted together. Section 623(d), which specifically prohibits private-sector retaliation, was enacted in 1967, see §4(d), 81 Stat. 603, but the federal-sector provision, §633a, was not added until 1974, see §28(b)(2), 88 Stat. 74.[2]

Respondent's argument is also undermined by the fact that the prohibitory language in the ADEA's federal-sector provision differs sharply from that in the corresponding ADEA provision relating to private-sector employment. In the private-sector provision, Congress set out a specific list

[2]The situation here is quite different from that which we faced in *Lehman* v. *Nakshian*, 453 U. S. 156 (1981), where both the private- and federal-sector provisions of the ADEA already existed and a single piece of legislation—the 1978 amendments to the ADEA—added a provision conferring a jury-trial right for private-sector ADEA suits but failed to include any similar provision for federal-sector suits. See Age Discrimination in Employment Act Amendments of 1978, §4(a)(2), 92 Stat. 190.

of forbidden employer practices. See 29 U. S. C. §623(a).[3] The omission from such a list of a specific prohibition of retaliation might have been interpreted as suggesting that Congress did not want to reach retaliation, and therefore Congress had reason to include a specific prohibition of retaliation, §623(d), in order to dispel any such inference.

The ADEA federal-sector provision, however, was not modeled after §623(d) and is couched in very different terms. The ADEA federal-sector provision was patterned "directly after" Title VII's federal-sector discrimination ban. *Lehman* v. *Nakshian*, 453 U. S. 156, 167, n. 15 (1981). Like the ADEA's federal-sector provision, Title VII's federal-sector provision contains a broad prohibition of "discrimination," rather than a list of specific prohibited practices. Compare §11, 86 Stat. 111, as amended, 42 U. S. C. §2000e–16(a) (2000 ed., Supp. V) (personnel actions affecting federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin"), with 29 U. S. C. §633a(a) (2000 ed., Supp. V) (personnel actions affecting federal employees who are at least 40 years of age "shall be made free from any discrimination based on age"). And like the ADEA's federal-sector provision, Title VII's federal-sector provision incorporates certain private-sector provisions but does not incorporate the provision prohibiting re-

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[3] Section 623 provides in part:

"(a) Employer practices

"It shall be unlawful for an employer—

"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

"(3) to reduce the wage rate of any employee in order to comply with this chapter."

taliation in the private sector. See 42 U. S. C. §2000e–16(d) (incorporating §§2000e–5(f) to (k) but not §2000e–3(a), which forbids private-sector retaliation).[4]

When Congress decided not to pattern 29 U. S. C. §633a(a) after §623(a) but instead to enact a broad, general ban on "discrimination based on age," Congress was presumably familiar with *Sullivan* and had reason to expect that this ban would be interpreted "'in conformity'" with that precedent. *Jackson*, 544 U. S., at 176. Under the reasoning of *Sullivan*, retaliation for complaining about age discrimination is "discrimination based on age," "just as retaliation for advocacy on behalf of [the] black lessee in *Sullivan* was discrimination on the basis of race." 544 U. S., at 176–177. Thus, because §§623(d) and 633a were enacted separately and are couched in very different terms, the absence of a federal-sector provision similar to §623(d) does not provide a sufficient reason to depart from the reasoning of *Sullivan* and *Jackson*.[5]

B

We see even less merit in respondent's reliance on 29 U. S. C. §633a(f), which provides that personnel actions by a

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[4] While the federal-sector provision of Title VII does not incorporate §2000e–3(a), the federal-sector provision of Title VII does incorporate a remedial provision, §2000e–5(g)(2)(A), that authorizes relief for a violation of §2000e–3(a). Petitioner argues that this remedial provision shows that Congress meant for the Title VII federal-sector provision's broad prohibition of "discrimination based on race, color, religion, sex, or national origin" to reach retaliation because otherwise there would be no provision banning retaliation in the federal sector and thus no way in which relief for retaliation could be awarded. Brief for Petitioner 20. The Federal Government, however, has declined to take a position on the question whether Title VII bans retaliation in federal employment, see Tr. of Oral Arg. 31, and that issue is not before us in this case.

[5] The Government's theory that the absence of a provision specifically banning federal-sector retaliation gives rise to the inference that §633a(a) does not ban retaliation would lead logically to the strange conclusion that §633a(a) also does not forbid age-discriminatory job notices and advertisements because §633a(a), unlike §623(e), fails to mention such practices expressly.

federal department, agency, or other entity covered by § 633a "shall not be subject to, or affected by, any provisions of this chapter" other than §§ 633a and 631(b), the provisions that restrict the coverage of the ADEA to persons who are at least 40 years of age. Respondent contends that recognizing federal-sector retaliation claims would be tantamount to making § 623(d) applicable to federal-sector employers and would thus contravene § 633a(f).

This argument is unsound because our holding that the ADEA prohibits retaliation against federal-sector employees is not in any way based on § 623(d). Our conclusion, instead, is based squarely on § 633a(a) itself, "unaffected by other sections" of the ADEA. *Lehman*, *supra*, at 168.

C

Respondent next advances a complicated argument concerning "[t]he history of congressional and executive branch responses to the problem of discrimination in federal employment." Brief for Respondent 27. After Title VII was made applicable to federal employment in 1972, see Equal Employment Opportunity Act, § 11, 86 Stat. 111, the Civil Service Commission issued new regulations that prohibited discrimination in federal employment based on race, color, religion, sex, and national origin (but not age), see 5 CFR § 713.211 (1973), as well as "reprisal[s]" prompted by complaints about such discrimination, § 713.262(a). When Congress enacted the ADEA's federal-sector provisions in 1974, respondent argues, Congress anticipated that the enactment of § 633a would prompt the Civil Service Commission to "extend its existing reprisal regulations" to cover age discrimination complaints and that Congress intended for the civil service process to provide the exclusive avenue for asserting retaliation claims. Brief for Respondent 27, 33, and n. 7. Respondent suggests that Congress took this approach because it believed that the civil service regulations "reflect[ed] a distinct set of public policy concerns in the civil service sector." *Id.*, at 27.

Respondent cites no direct evidence that Congress actually took this approach;[6] respondent's argument rests on nothing more than unsupported speculation. And, in any event, respondent's argument contradicts itself. If, as respondent maintains, "[s]ection 633a(a) does not confer an anti-retaliation right," *id.*, at 9, then there is no reason to assume that Congress expected the Civil Service Commission to respond to the enactment of § 633a(a) by issuing new regulations prohibiting retaliation. On the contrary, if, as respondent maintains, Congress had declined to provide an antiretaliation right, then Congress presumably would have expected the Civil Service Commission to abide by that policy choice.

D

Respondent's final argument is that principles of sovereign immunity "require that Section 633a(a) be read narrowly as prohibiting substantive age discrimination, but not retaliation." *Id.*, at 44. Respondent contends that the broad waiver of sovereign immunity in the Postal Reorganization Act, 39 U. S. C. § 401(1), is beside the point for present purposes because, for many federal agencies, the only provision

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[6] Respondent asks us to infer that § 633a(a) does not proscribe retaliation because, when Congress made the ADEA applicable to the Federal Government, Congress did not simply subject the Federal Government to the ADEA's private-employment provisions by amending the definition of "employer" to include the United States. Respondent contends that a similar inference may be drawn from the fact that in 1974 Congress added to the Fair Labor Standards Act of 1938 (FLSA) a provision specifically making it unlawful to retaliate against an employee for attempting to vindicate FLSA rights. See § 215(a)(3). These arguments fail to appreciate the significance of § 633a(a)'s broad prohibition of "discrimination based on age." Because Congress had good reason to expect that this broad ban would be interpreted in the same way that *Sullivan* v. *Little Hunting Park, Inc.*, 392 U. S. 657 (1968) *(per curiam)*, had interpreted the broad ban on racial discrimination in 42 U. S. C. § 1982, the inference that respondent asks us to draw is unfounded.

that waives sovereign immunity for ADEA claims is contained in §633a, and therefore this waiver provision "must be construed strictly in favor of the sovereign." Brief for Respondent 44 (quoting *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992); internal quotation marks omitted).

Respondent is of course correct that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Peña*, 518 U. S. 187, 192 (1996). But this rule of construction is satisfied here. Subsection (c) of §633a unequivocally waives sovereign immunity for a claim brought by "[a]ny person aggrieved" to remedy a violation of §633a. Unlike §633a(c), §633a(a) is not a waiver of sovereign immunity; it is a substantive provision outlawing "discrimination." That the waiver in §633a(c) applies to §633a(a) claims does not mean that §633a(a) must surmount the same high hurdle as §633a(c). See *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 472–473 (2003) (where one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision "'need not . . . be construed in the manner appropriate to waivers of sovereign immunity'" (quoting *United States* v. *Mitchell*, 463 U. S. 206, 218–219 (1983))). But in any event, even if §633a(a) must be construed in the same manner as §633a(c), we hold, for the reasons previously explained, that §633a(a) prohibits retaliation with the requisite clarity.

* * *

For these reasons, we hold that §633a(a) prohibits retaliation against a federal employee who complains of age discrimination. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join as to all but Part I, dissenting.

The Court today holds that the federal-sector provision of the Age Discrimination in Employment Act encompasses not only claims of age discrimination—which its language expressly provides—but also claims of retaliation for complaining about age discrimination—which its language does not. Protection against discrimination may include protection against retaliation for complaining about discrimination, but that is not always the case. The separate treatment of each in the private-sector provision of the ADEA makes that clear. In my view, the statutory language and structure, as well as the fact that Congress has always protected federal employees from retaliation through the established civil service process, confirm that Congress did not intend those employees to have a separate judicial remedy for retaliation under the ADEA. I respectfully dissent.

I

Congress enacted the Age Discrimination in Employment Act of 1967, 81 Stat. 602, which at the time applied only to private employers, with the purpose of "promot[ing] employment of older persons based on their ability rather than age; . . . [of] prohibit[ing] arbitrary age discrimination in employment; [and of] help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. §621(b). The 1967 Act implemented this purpose in two principal ways. First, the statute made it unlawful for an employer to "discriminate against any individual . . . because of such individual's age." §623(a)(1). Second, Congress enacted a specific antiretaliation provision, which made it "unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or partic-

ipated in any manner in an investigation, proceeding, or litigation under" the ADEA. §623(d).

In the Fair Labor Standards Amendments of 1974 (FLSA Amendments), §28(b)(2), 88 Stat. 74, Congress (among other things) extended the ADEA to most Executive Branch employees by adopting 29 U. S. C. §633a. Like its private-sector counterpart, this federal-sector provision includes a ban on discrimination on the basis of age. Unlike its private-sector counterpart, the federal-sector provision does *not* include a separate ban on retaliation. The federal-sector provision specifies only that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age [in various federal agencies] shall be made free from any discrimination based on age." §633a(a).

Despite the absence of an express retaliation provision in §633a(a), the Court finds that the statute encompasses both discrimination and retaliation claims. To support this proposition, the Court principally relies on our decisions in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969), and *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167 (2005). In my view, the majority reads these cases for more than they are worth.

As the majority correctly states, we held in *Sullivan* that 42 U. S. C. §1982, which prohibits race discrimination in the sale or rental of property, also provides a cause of action for retaliation.[1] 396 U. S., at 237. More recently, we held in *Jackson* that Title IX of the Education Amendments of 1972, 86 Stat. 373—which provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be ex-

[1] To the extent there was any disagreement about whether *Sullivan* was really a retaliation case, or whether it dealt only with third-party standing, the view put forth by the Court won the day in *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167 (2005). Compare *id.*, at 176, and n. 1, with *id.*, at 194 (THOMAS, J., dissenting). Whatever the merits of this disagreement, I accept *Jackson*'s (and the Court's) interpretation as a matter of *stare decisis*. See *CBOCS West, Inc.* v. *Humphries*, *ante*, at 447.

cluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U. S. C. § 1681(a)—encompasses claims of retaliation for complaints about sex discrimination. 544 U. S., at 173–174.

To the extent the majority takes from these precedents the principle that broad antidiscrimination provisions may also encompass an antiretaliation component, I do not disagree. That is why I am able to join today's opinion in *CBOCS West, Inc.* v. *Humphries*, *ante*, at 457 (holding that a retaliation claim is cognizable under 42 U. S. C. § 1981). But it cannot be—contrary to the majority's apparent view—that *any* time Congress proscribes "discrimination based on X," it means to proscribe retaliation as well. That is clear from the private-sector provision of the ADEA, which includes a ban on "discriminat[ion] against any individual . . . because of such individual's age," 29 U. S. C. § 623(a)(1), but *also* includes a separate (and presumably not superfluous) ban on retaliation, § 623(d).

Indeed, we made this precise observation in *Jackson* itself. The respondent in that case argued that Title IX's ban on discrimination could not include a cause of action for retaliation because Title VII of the Civil Rights Act of 1964, like the private-sector provision of the ADEA, includes discrete discrimination and retaliation provisions. See 42 U. S. C. §§ 2000e–2 (discrimination), 2000e–3 (retaliation). We distinguished Title VII on the ground that "Title IX is a broadly written general prohibition on discrimination," while "Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute." 544 U. S., at 175. Thus, while we distinguished Title VII from Title IX in *Jackson*, we also acknowledged that not every express ban on discrimination must be read as a ban on retaliation as well.

What is more, although the majority asserts that *Jackson* rejected the view that "a claim of retaliation is conceptually

different from a claim of discrimination," *ante*, at 481, we have since explained that antidiscrimination and antiretaliation provisions are indeed conceptually distinct, and serve distinct purposes. In *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53 (2006), we considered whether the antiretaliation provision in the Title VII private-sector provision, 42 U. S. C. §2000e–3(a)—which is materially indistinguishable from that in the ADEA—applies "only [to] those employer actions and resulting harms that are related to employment or the workplace." 548 U. S., at 61. In answering that question in the negative, we explained:

> "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their [protected] status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i. e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i. e.*, their conduct." *Id.*, at 63 (citation omitted).[2]

While I take from *Sullivan* and *Jackson* the proposition that broad bans on discrimination, standing alone, may be read to include a retaliation component, the provision at

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[2]The Court views this discussion of *Burlington* as "[s]uggesting that [the Court has] retreated from the reasoning of *Sullivan* and *Jackson*." *Ante*, at 481, n. 1. Not a bit. The discussion simply points out what *Burlington* plainly said: that there is a distinction between discrimination and retaliation claims. That does not mean Congress cannot address both in the same provision, as we held it did in *Sullivan* and *Jackson* and as we hold today it did in *CBOCS West, Inc.*, *ante*, at 457. But it does confirm that Congress may choose to separate the two, as the private-sector provision of the ADEA, as well as the portion of Title VII interpreted in *Burlington*, makes clear.

issue here does not stand alone. And, as *Jackson* itself makes clear, see 544 U. S., at 173, 175, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). Here the text and structure of the statute, the broader statutory scheme of which it is a part, and distinctions between federal- and private-sector employment convince me that §633a(a) does not provide a cause of action for retaliation.

II

We have explained that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted). If, as the majority holds, the ban on "discrimination based on age" in §633a(a) encompasses both discrimination and retaliation claims, it is difficult to understand why Congress would have felt the need to specify in §623 separate prohibitions against *both* "discriminat[ion]" "because of [an] individual's age," *and* retaliation.

The majority responds by noting that "'[n]egative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Ante*, at 486 (quoting *Lindh* v. *Murphy*, 521 U. S. 320, 330 (1997)). Here, the majority notes that §623 was enacted in 1967, while §633a was not passed until 1974. *Ante*, at 486. Fair enough, but while I do not quarrel with this principle as a general matter, I do not think it does the work the majority thinks it does. Congress obviously had the private-sector ADEA provision prominently before it when it enacted §633a, because the same bill that included §633a also amended the private-sector provision.

See, *e. g.*, § 28(a)(2), 88 Stat. 74 (amending the definition of "employer" in 29 U. S. C. § 630(b) to include States and their political subdivisions). Indeed, it is quite odd to assume, as the majority does, see *ante*, at 485, 488, that the Congress that enacted § 633a was aware of and relied upon our decision in *Sullivan*—which interpreted 42 U. S. C. § 1982, a wholly unrelated provision—but was not attuned to its own work reflected in the differences between 29 U. S. C. §§ 623 and 633a. Even if the negative implication to be drawn from those differences may not be at its "strongest" under these circumstances, it is certainly strong enough.

Moreover, and more to the point, we have relied on the differences in language between the federal- and private-sector provisions of the ADEA specifically in our interpretation of § 633a. In *Lehman* v. *Nakshian*, 453 U. S. 156 (1981), we faced the question whether a person bringing an action under § 633a(c), alleging a violation of § 633a(a), was entitled to a trial by jury. In holding that there was no jury-trial right available against the Federal Government, we relied on the fact that while the ADEA's federal-sector provision did not include a provision for a jury trial, the analogous grant of a right of action in the private-sector provision, § 626(c), "*expressly* provides for jury trials." *Id.*, at 162. We reasoned that "Congress accordingly demonstrated that it knew how to provide a statutory right to a jury trial when it wished to do so elsewhere in the very 'legislation cited.' . . . But in [§ 633a(c)] it failed explicitly to do so." *Ibid.* (quoting *Galloway* v. *United States*, 319 U. S. 372, 389 (1943)). So too here. "Congress . . . demonstrated that it knew how to" provide a retaliation cause of action "when it wished to do so elsewhere in the very 'legislation cited,'" but "failed explicitly to do so" in § 633a(a).

The majority argues that this inference is weakened by the fact that, in "the private-sector provision, Congress set out a specific list of forbidden employer practices," *ante*, at 486–487, while § 633a(a) is a "broad, general ban on 'discrimi-

nation based on age,'" *ante*, at 488. This point cuts against the majority. Section 623 drew a distinction between prohibited "employer practices" that discriminate based on age, and retaliation. See §§ 623(a) (discriminatory "[e]mployer practices"), 623(d) (retaliation). Section 633a(a) phrased the prohibited discrimination in terms of "personnel actions." Just as Congress did not regard retaliation as included within "employer practices," but dealt with it separately in § 623(d), the counterpart to "employer practices" in § 633a—discriminatory "personnel actions"—should similarly not be read to include retaliation.

The argument that some meaning ought to attach to Congress's inclusion of an antiretaliation provision in § 623 but not in § 633a is further supported by several other factors. To begin with, Congress *expressly* made clear that the ADEA's private-sector provisions should not apply to their federal-sector counterpart, by providing that "[a]ny personnel action . . . referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of" the ADEA, except for one provision not relevant here. § 633a(f). The majority sees no "merit in respondent's reliance on 29 U. S. C. § 633a(f)." *Ante*, at 488. But again, we relied on this very provision in *Lehman*. We explained that this subsection "clearly emphasize[s] that [§ 633a] was self-contained and unaffected by other sections" of the ADEA, 453 U. S., at 168, a fact that we used to support our holding that the federal-sector provision does not provide a right to a jury trial, even though the private-sector provision does. In short, Congress was aware that there were significant differences between the private- and federal-sector portions of the ADEA, and specified that no part of the former should be understood to have been implicitly imported into the latter.

Other actions Congress took at the same time that it enacted § 633a in 1974 further underscore the point that Congress deliberately chose to exclude retaliation claims from

the ADEA's federal-sector provision. The Fair Labor Standards Amendments of 1974, as the Act's name suggests, dealt for the most part not with the ADEA, but with the Fair Labor Standards Act of 1938, extending that statute's protections to federal employees. See FLSA Amendments, §6(a)(2), 88 Stat. 58. In doing so, Congress explicitly subjected federal employers to the FLSA's express antiretaliation provision, 29 U. S. C. §215(a)(3). Congress did *not* similarly subject the Federal Government to the express antiretaliation provision in the ADEA, strongly suggesting that this was a conscious choice.

The majority responds that this "inference . . . is unfounded" because "Congress had good reason to expect that this broad ban would be interpreted in the same way that *Sullivan* . . . had interpreted the broad ban on racial discrimination in 42 U. S. C. §1982." *Ante*, at 490, n. 6. Anything is possible, but again, it seems far more likely that Congress had its eye on the private-sector provision of the ADEA in crafting the federal one, rather than on one of our precedents on a different statute. See *supra*, at 496–497.

But whatever the merits of this argument, it does not rebut the import of other probative provisions of the FLSA Amendments. In particular, Congress specifically chose in the FLSA Amendments to treat States and the Federal Government differently with respect to the ADEA itself. It subjected the former to the ADEA's private-sector provision, see FLSA Amendments, §28(a)(2), 88 Stat. 74—including the express prohibition against retaliation in §623(d)—while creating §633a as a stand-alone prohibition against discrimination in federal employment, without an antiretaliation provision, see §28(b)(2), *ibid.* This decision evinces a deliberate legislative choice *not* to extend those portions of the ADEA's private-sector provisions that are not expressly included in §633a, as of course Congress specified in §633a(f).

Given all this, it seems safe to say that the text and structure of the statute strongly support the proposition that Congress did not intend to include a cause of action for retaliation against federal employees in §633a(a).

III

But *why* would Congress allow retaliation suits against private-sector and state employers, but not against the Federal Government? The answer is that such retaliation was dealt with not through a judicial remedy, but rather the way retaliation in the federal workplace was typically addressed—through the established civil service system, with its comprehensive protection for Government workers. Congress was quite familiar with that detailed administrative system—one that already existed for most federal employees, but not for private ones. This approach, unlike the Court's, is consistent with the fact that Congress has recognized that regulation of the civil service is a complex issue, requiring "careful attention to conflicting policy considerations" and "balancing governmental efficiency and the rights of employees," *Bush* v. *Lucas*, 462 U. S. 367, 388, 389 (1983). The resulting system often requires remedies different from those found to be appropriate for the private sector (or even for the States).

A

Before Title VII was extended to federal employees in 1972, discrimination in federal employment on the basis of race, color, religion, sex, or national origin was prohibited by executive order. See Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969). Civil service regulations implemented this policy by authorizing Executive Branch employees to bring administrative complaints for allegedly discriminatory acts, including "personnel action[s]," 5 CFR §§713.211, 713.214(a)(1)(i) (1972). These regulations further provided that such complainants, their representatives, and witnesses "shall be free from restraint, interference, coercion, discrimi-

nation, or reprisal" for their involvement in the complaint process. §§713.214(b) (complainants and representatives), 713.218(e) (witnesses).

The Civil Service Commission (CSC) promulgated a detailed scheme through which federal employees could vindicate these rights, including the express antiretaliation protections. More serious personnel actions, known as "adverse actions," could be challenged before the employing agency and appealed to the CSC, see §§713.219(a) and (b), 752.203, 771.202, 771.208, 771.222, while less serious personnel actions and "any [other] matter of concern or dissatisfaction" could be challenged under alternative procedures that were also appealable to the CSC, see §§713.217(b), 713.218, 713.219(a) and (c), 713.231(a), 771.302(a). Retaliation was proscribed in all events. See, *e. g.*, §§713.219(a) and (c) (incorporating Part 771 antiretaliation provisions to complaint procedures except certain appeals to the CSC); §§771.105(a)(1) and (b)(1), 771.211(e) (antiretaliation provisions for CSC appeals).

In 1972, Congress applied Title VII to the federal sector, Equal Employment Opportunity Act of 1972 (EEO Act), §11, 86 Stat. 111, mandating that "[a]ll personnel actions" with respect to federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U. S. C. §2000e–16(a). Congress empowered the CSC "to enforce the provisions of subsection (a) of this section through appropriate remedies," and to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." §2000e–16(b).

Under this grant of authority, as well as its prior authority under statute and executive order, the CSC revised its regulations both "to implement the [EEO Act] and to strengthen the system of complaint processing." 37 Fed. Reg. 22717 (1972) (Part 713 Subpart B). As with its prior system of administrative enforcement, the CSC distinguished between

"complaints of discrimination on grounds of race, color, religion, sex, or national origin," 5 CFR § 713.211 (1973), on the one hand, and charges by a "complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint," § 713.262(a), on the other. The regulations imposed upon employing agencies the obligation of "timely investigation and resolution of complaints including complaints of coercion and reprisal," 37 Fed. Reg. 22717; see also 5 CFR § 713.220, and made clear the procedures for processing retaliation claims, §§ 713.261, 713.262. The regulations further mandated that the CSC "require the [employing] agency to take whatever action is appropriate" with respect to allegations of retaliation if the agency itself has "not completed an appropriate inquiry," § 713.262(b)(1).

Thus, leading up to the enactment of 29 U. S. C. § 633a in 1974, the CSC's comprehensive regulatory scheme set forth a broadly applicable remedy for retaliation against federal employees for filing complaints or otherwise participating in the EEO process. And when Congress empowered the CSC in 1974 to "enforce the provisions of [§ 633a(a)] through appropriate remedies," and to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities" under that statute, § 28(b)(2), 88 Stat. 75, the assumption that Congress expected the CSC to create an administrative antiretaliation remedy, just as it had for complaints of discrimination under Title VII, is compelling. And sure enough, the CSC did just that promptly after § 633a was enacted. See 39 Fed. Reg. 24351 (1974); 5 CFR § 713.511 (1975).

Given this history of addressing retaliation through administrative means, combined with the complicated nature (relative to the private sector) of federal personnel practices, it is therefore by no means anomalous that Congress would have dealt with the "primary objective" of combating age discrimination through a judicial remedy, *Burlington*, 548

U. S., at 63, but left it to expert administrators used to dealing with personnel matters in the federal work force to "secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees," *ibid.*

B

The majority discounts the above argument as "unsupported speculation." *Ante*, at 490. It seems to me that the fact that the Executive Branch had always treated discrimination and retaliation as distinct, and that it enacted administrative remedies for retaliation almost immediately after the passage of the Title VII and ADEA federal-sector provisions, provide plenty of support. But even if the majority is right, the view that Congress intended to treat retaliation for age discrimination complaints as a problem to be dealt with primarily through administrative procedures, rather than through the judicial process in the first instance, is confirmed by Congress's passage of the Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1111.

The CSRA, as amended, has a detailed comprehensive antiretaliation provision, which generally makes it unlawful for Executive Branch employers to

> "take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of . . . (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation [or] (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)." 5 U. S. C. §2302(b)(9).[3]

[3] Neither 29 U. S. C. §633a nor the CSRA cover employees of Congress or of the Executive Office of the President and Executive Residence of the White House. See §633a(a); 5 U. S. C. §2302(a)(2)(B). But Congress has expressly extended the protections of the ADEA to such employees, 2 U. S. C. §1311(a)(2) (Congress); 3 U. S. C. §411(a)(2) (White House), and

This antiretaliation provision, which plainly applies to retaliation for exercising rights under the civil rights statutes, including the ADEA, is supported by a host of administrative remedies. If the alleged retaliation results in adverse actions such as removal, suspension for more than 14 days, or reduction in pay, see § 7512, an appeal can be taken directly to the Merit Systems Protection Board (MSPB), §§ 7513(d), 7701, with judicial review in the United States Court of Appeals for the Federal Circuit, § 7703(b)(1). Retaliation claims based on less serious allegations are first investigated by the Office of Special Counsel. If the Office finds that there are reasonable grounds supporting the retaliation charge, it must report its determination to, and may seek corrective action from, the MSPB. §§ 1214(a)(1)(A), (b)(2)(B), (C), and 1214(c). Again, judicial review in the Federal Circuit is available. § 7703(b)(1). In all events, upon a finding that retaliation has in fact occurred, the MSPB has the authority to order corrective action, §§ 1214(b)(4), 7701(b)(2), to order attorney's fees on appeal, § 7701(g), and to discipline federal employees responsible for retaliatory acts, § 1215.[4]

To be sure, the CSRA was enacted after § 633a. Nevertheless, we have explained, in the same context of federal employee remedies, that the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States* v. *Fausto*, 484 U. S. 439, 453 (1988). That is precisely the situation here.

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provided them with an express retaliation remedy, 2 U. S. C. § 1317; 3 U. S. C. § 417(a).

[4]The Postal Service—Gómez-Pérez's employer—operates under its own personnel system. But the Postal Service's Employee and Labor Relations Manual (ELM) prohibits "any action, event, or course of conduct that . . . subjects any person to reprisal for prior involvement in EEO activity." ELM § 665.23, pp. 681–682 (June 2007).

Indeed, this is particularly true with respect to Congress's regulation of federal employment. We have explained that the CSRA is an "integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.*, at 445. Perhaps the CSRA's "civil service remedies [are] not as effective as an individual damages remedy" that can be obtained in federal court, *Bush*, 462 U. S., at 372, or perhaps a quicker and more familiar administrative remedy *is* more effective as a practical matter. That is not the issue. Cf. *id.*, at 388 (the question whether a judicial remedy against a federal employer for a First Amendment violation should be implied "obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff"). The CSRA establishes an "elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Id.*, at 385. Retaliation as a general matter was already addressed for federal employees. I would not read into § 633a a judicial remedy for retaliation when Congress—which has "developed considerable familiarity with balancing governmental efficiency and the rights of employees," *id.*, at 389—chose to provide a detailed administrative one.

* * *

The question whether a ban against "discrimination based on" a protected status such as age can also be read to encompass a ban on retaliation can be answered only after careful scrutiny of the particular provision in question. In this case, an analysis of the statutory language of § 633a and the broader scheme of which it is a part confirms that Congress did not intend implicitly to create a judicial remedy for retaliation against federal employees, when it did so expressly for private-sector employees. Congress was not sloppy in

creating this distinction; it did so for good reason: because the federal workplace is governed by comprehensive regulation, of which Congress was well aware, while the private sector is not.

For these reasons, I would affirm the judgment of the Court of Appeals.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I join all but Part I of THE CHIEF JUSTICE's dissent. I write separately to reiterate my view that *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167 (2005), incorrectly conflated the concepts of retaliation and discrimination. The text of the federal-sector provision of the Age Discrimination in Employment Act of 1967 is clear: It prohibits only "discrimination based on age." 29 U. S. C. §633a(a). If retaliation is not "discrimination on the basis of sex," *Jackson*, *supra*, at 185 (THOMAS, J., dissenting), or "discrimination based on race," *CBOCS West, Inc.* v. *Humphries*, *ante*, at 459 (THOMAS, J., dissenting), it is certainly not "discrimination based on age." Because §633a(a) provides no basis for implying a private right of action for retaliation claims, and its context only reaffirms its plain meaning, see *ante*, at 496–500 (opinion of ROBERTS, C. J.), I would affirm the judgment below.

Syllabus

UNITED STATES *v.* SANTOS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06–1005. Argued October 3, 2007—Decided June 2, 2008

In an illegal lottery run by respondent Santos, runners took commissions from the bets they gathered, and some of the rest of the money was paid as salary to respondent Diaz and other collectors and to the winning gamblers. Based on these payments to runners, collectors, and winners, Santos was convicted of, *inter alia*, violating the federal money-laundering statute, 18 U. S. C. § 1956, which prohibits the use of the "proceeds" of criminal activities for various purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity, § 1956(a)(1)(A)(i) and § 1956(h). Based on his receipt of salary, Diaz pleaded guilty to conspiracy to launder money. The Seventh Circuit affirmed the convictions. On collateral review, the District Court ruled that, under intervening Circuit precedent interpreting the word "proceeds" in the federal money-laundering statute, § 1956(a)(1)(A)(i) applies only to transactions involving criminal profits, not criminal receipts. Finding no evidence that the transactions on which respondents' money-laundering convictions were based involved lottery profits, the court vacated those convictions. The Seventh Circuit affirmed.

Held: The judgment is affirmed.

461 F. 3d 886, affirmed.

JUSTICE SCALIA, joined by JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG, concluded in Parts I–III and V that the term "proceeds" in § 1956(a)(1) means "profits," not "receipts." Pp. 510–521, 524.

(a) The rule of lenity dictates adoption of the "profits" reading. The statute nowhere defines "proceeds." An undefined term is generally given its ordinary meaning. *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187. However, dictionaries and the Federal Criminal Code sometimes define "proceeds" to mean "receipts" and sometimes "profits." Moreover, the many provisions in the federal money-laundering statute that use the word "proceeds" make sense under either definition. The rule of lenity therefore requires the statute to be interpreted in favor of defendants, and the "profits" definition of "proceeds" is always more defendant-friendly than the "receipts" definition. Pp. 510–514.

(b) The Government's contention that the "profits" interpretation fails to give the money-laundering statute its intended scope begs the

question; the Government's contention that the "profits" interpretation hinders effective enforcement of the law is exaggerated. Neither suffices to overcome the rule of lenity. Pp. 514–521.

(c) None of the transactions on which respondents' money-laundering convictions were based can fairly be characterized as involving the lottery's profits. P. 524.

JUSTICE SCALIA, joined by JUSTICE SOUTER and JUSTICE GINSBURG, concluded in Part IV that JUSTICE STEVENS' position that "proceeds" should be interpreted to mean "profits" for some predicate crimes, "receipts" for others, is contrary to this Court's precedents holding that judges cannot give the same statutory text different meanings in different cases, see *Clark* v. *Martinez*, 543 U. S. 371. Pp. 521–524.

JUSTICE STEVENS concluded that revenue a gambling business uses to pay essential operating expenses is not "proceeds" under 18 U. S. C. § 1956. When, as here, Congress fails to define potentially ambiguous statutory terms, it effectively delegates the task to federal judges. See *Commissioner* v. *Fink*, 483 U. S. 89, 104. Because Congress could have required that "proceeds" have one meaning when referring to some of the specified unlawful activities listed in § 1956(c)(7) and a different meaning when referring to others, judges filling statutory gaps may also do so, as long as they are conscientiously endeavoring to carry out Congress' intent. Section 1956's legislative history makes clear that "proceeds" includes gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales, but sheds no light on how to identify the proceeds of an unlicensed stand-alone gambling venture. Furthermore, the consequences of applying a "gross receipts" definition of "proceeds" to respondents are so perverse that Congress could not have contemplated them: Allowing the Government to treat the mere payment of an illegal gambling business' operating expenses as a separate offense is in practical effect tantamount to double jeopardy, which is particularly unfair in this case because the penalties for money laundering are substantially more severe than those for the underlying offense of operating a gambling business. Accordingly, the rule of lenity may weigh in the determination, and in that respect the plurality's opinion is persuasive. Pp. 524–528.

SCALIA, J., announced the judgment of the Court and delivered an opinion, in which SOUTER and GINSBURG, JJ., joined, and in which THOMAS, J., joined as to all but Part IV. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 524. BREYER, J., filed a dissenting opinion, *post*, p. 529. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and KENNEDY and BREYER, JJ., joined, *post*, p. 531.

Matthew D. Roberts argued the cause for the United States. With him on the briefs were former *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Joel M. Gershowitz*.

Todd G. Vare argued the cause for respondents. With him on the brief for respondent Efrain Santos was *Paul L. Jefferson*. *Stuart Altschuler* filed a brief for respondent Benedicto Diaz.*

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which JUSTICE SOUTER and JUSTICE GINSBURG join, and in which JUSTICE THOMAS joins as to all but Part IV.

We consider whether the term "proceeds" in the federal money-laundering statute, 18 U. S. C. § 1956(a)(1), means "receipts" or "profits."

I

From the 1970's until 1994, respondent Santos operated a lottery in Indiana that was illegal under state law. See Ind. Code § 35–45–5–3 (West 2004). Santos employed a number of helpers to run the lottery. At bars and restaurants, Santos's runners gathered bets from gamblers, kept a portion of the bets (between 15% and 25%) as their commissions, and delivered the rest to Santos's collectors. Collectors, one of whom was respondent Diaz, then delivered the money to Santos, who used some of it to pay the salaries of collectors (including Diaz) and to pay the winners.

These payments to runners, collectors, and winners formed the basis of a 10-count indictment filed in the United States District Court for the Northern District of Indiana, naming Santos, Diaz, and 11 others. A jury found Santos guilty of one count of conspiracy to run an illegal gambling business (18 U. S. C. § 371), one count of running an illegal

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Jeffrey T. Green and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

gambling business (§ 1955), one count of conspiracy to launder money (§ 1956(a)(1)(A)(i) and § 1956(h)), and two counts of money laundering (§ 1956(a)(1)(A)(i)). The court sentenced Santos to 60 months of imprisonment on the two gambling counts and to 210 months of imprisonment on the three money-laundering counts. Diaz pleaded guilty to conspiracy to launder money, and the District Court sentenced him to 108 months of imprisonment. The Court of Appeals affirmed the convictions and sentences. *United States* v. *Febus*, 218 F. 3d 784 (CA7 2000). We declined to review the case. 531 U. S. 1021 (2000).

Thereafter, respondents filed motions under 28 U. S. C. § 2255, collaterally attacking their convictions and sentences. The District Court rejected all of their claims but one, a challenge to their money-laundering convictions based on the Seventh Circuit's subsequent decision in *United States* v. *Scialabba*, 282 F. 3d 475 (2002), which held that the federal money-laundering statute's prohibition of transactions involving criminal "proceeds" applies only to transactions involving criminal profits, not criminal receipts. *Id.*, at 478. Applying that holding to respondents' cases, the District Court found no evidence that the transactions on which the money-laundering convictions were based (Santos's payments to runners, winners, and collectors and Diaz's receipt of payment for his collection services) involved profits, as opposed to receipts, of the illegal lottery, and accordingly vacated the money-laundering convictions. The Court of Appeals affirmed, rejecting the Government's contention that *Scialabba* was wrong and should be overruled. 461 F. 3d 886 (CA7 2006). We granted certiorari. 550 U. S. 902 (2007).

II

The federal money-laundering statute prohibits a number of activities involving criminal "proceeds." Most relevant to this case is 18 U. S. C. § 1956(a)(1)(A)(i), which criminalizes

transactions to promote criminal activity.[1] This provision uses the term "proceeds" in describing two elements of the offense: The Government must prove that a charged transaction "in fact involve[d] the proceeds of specified unlawful activity" (the proceeds element), and it also must prove that a defendant knew "that the property involved in" the charged transaction "represent[ed] the proceeds of some form of unlawful activity" (the knowledge element). § 1956(a)(1).

The federal money-laundering statute does not define "proceeds." When a term is undefined, we give it its ordinary meaning. *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187 (1995). "Proceeds" can mean either "receipts" or "profits." Both meanings are accepted, and have long been accepted, in ordinary usage. See, *e. g.*, 12 Oxford English Dictionary 544 (2d ed. 1989); Random House Dictionary of the English Language 1542 (2d ed. 1987); Webster's New International Dictionary 1972 (2d ed. 1954) (hereinafter Webster's 2d). The Government contends that dictionaries generally prefer the "receipts" definition over the "profits" definition, but any preference is too slight for us to conclude that "receipts" is the *primary* meaning of "proceeds."

"Proceeds," moreover, has not acquired a common meaning in the provisions of the Federal Criminal Code. Most leave the term undefined. See, *e. g.*, 18 U. S. C. § 1963; 21 U. S. C. § 853. Recognizing the word's inherent ambiguity, Congress

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[1] Section 1956(a)(1) reads as follows: "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . (A)(i) with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both."

Respondents were also convicted of conspiring to launder money under § 1956(h). Because the Government has not argued that respondents' conspiracy convictions could stand if "proceeds" meant "profits," see 461 F. 3d 886, 889 (CA7 2006), we do not address that possibility.

has defined "proceeds" in various criminal provisions, but sometimes has defined it to mean "receipts" and sometimes "profits." Compare 18 U. S. C. §2339C(e)(3) (2000 ed., Supp. V) (receipts), §981(a)(2)(A) (2000 ed.) (same), with §981(a)(2)(B) (profits).

Since context gives meaning, we cannot say the money-laundering statute is truly ambiguous until we consider "proceeds" not in isolation but as it is used in the federal money-laundering statute. See *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). The word appears repeatedly throughout the statute, but all of those appearances leave the ambiguity intact. Section 1956(a)(1) itself, for instance, makes sense under either definition: One can engage in a financial transaction with either receipts or profits of a crime; one can intend to promote the carrying on of a crime with either its receipts or its profits; and one can try to conceal the nature, location, etc., of either receipts or profits. The same is true of all the other provisions of this legislation in which the term "proceeds" is used. They make sense under either definition. See, for example, §1956(a)(2)(B), which speaks of "proceeds" represented by a "monetary instrument or funds."

JUSTICE ALITO's dissent (the principal dissent) makes much of the fact that 14 States that use *and define* the word "proceeds" in their money-laundering statutes,[2] the Model

[2]The majority of States with money-laundering laws, in fact, use "proceeds" *without defining it*. See Colo. Rev. Stat. Ann. §18–18–408 (2007); Fla. Stat. §896.101 (2006); Ga. Code Ann. §§7–1–911, 7–1–915 (2004); Idaho Code §18–8201 (Lexis 2004); Ill. Comp. Stat., ch. 720, §5/29B–1 (West 2006); Kan. Stat. Ann. §65–4142 (2002); Minn. Stat. §§609.496 to 609.497 (2006); Miss. Code Ann. §97–23–101 (2006); Mo. Rev. Stat. §574.105 (2007 Supp.); Mont. Code Ann. §45–6–341 (2007); Nev. Rev. Stat. §207.195 (2007); N. Y. Penal Law Ann. §§470.00 to 470.25 (West Supp. 2008); Okla. Stat., Tit. 63, §2–503.1 (West 2001); Ore. Rev. Stat. §164.170 (2007); 18 Pa. Cons. Stat. §5111 (2002); R. I. Gen. Laws §11–9.1–15 (Supp. 2007); S. C. Code Ann. §44–53–475 (2002); Tenn. Code Ann. §§39–14–901 to 39–14–909 (2006). Courts in these States have not construed the term one way or

Money Laundering Act, and an international treaty on the subject, all define the term to include gross receipts. See *post*, at 533–535. We do not think this evidence shows that the drafters of the federal money-laundering statute used "proceeds" as a term of art for "receipts." Most of the state laws cited by the dissent, the Model Act, and the treaty postdate the 1986 federal money-laundering statute by several years, so Congress was not acting against the backdrop of those definitions when it enacted the federal statute. If anything, they show that "proceeds" is ambiguous and that others who believed that money-laundering statutes ought to include gross receipts sought to clarify the ambiguity that Congress created when it left the term undefined.[3]

Under either of the word's ordinary definitions, all provisions of the federal money-laundering statute are coherent;

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the other. But cf. *State* v. *Jackson*, 124 S. W. 3d 139, 143 (Tenn. Crim. App. 2003) (linking "proceeds" with the defined term "property"). California might belong in this list, for it has a money-laundering provision in its Penal Code, in which it uses the term "proceeds" but does not define it. See Cal. Penal Code Ann. § 186.10 (West 1999). But California also has a more limited money-laundering statute that uses and defines "proceeds." See Cal. Health & Safety Code Ann. § 11370.9(h)(1) (West 2007). Maryland might belong on the list as well: Its general money-laundering statute defines "proceeds" simply to set a minimum value on the proceeds laundered, Md. Crim. Law Code Ann. § 5–623(a)(5) (Lexis 2002) ("money or any other property with a value exceeding $10,000"), and its more limited money-laundering statute does not define the term, see § 11–304.

[3]The principal dissent also suggests that Congress thought "proceeds" meant "receipts" because the House of Representatives (but not the Senate) had passed a money-laundering bill that did not use the word "proceeds" but rather used and defined a term ("criminally derived property") that, perhaps, included receipts. See *post*, at 535, n. 5. Putting aside the question whether resort to legislative history is ever appropriate when interpreting a criminal statute, compare *United States* v. *R. L. C.*, 503 U. S. 291, 306, n. 6 (1992), with *id.*, at 307 (SCALIA, J., concurring in part and concurring in judgment), that bit of it is totally unenlightening because we do not know why the earlier House terminology was rejected—because "proceeds" captured the same meaning, or because "proceeds" carried a narrower meaning?

no provisions are redundant; and the statute is not rendered utterly absurd. From the face of the statute, there is no more reason to think that "proceeds" means "receipts" than there is to think that "proceeds" means "profits." Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. See *United States* v. *Gradwell*, 243 U. S. 476, 485 (1917); *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931); *United States* v. *Bass*, 404 U. S. 336, 347–349 (1971). This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. Because the "profits" definition of "proceeds" is always more defendant-friendly than the "receipts" definition, the rule of lenity dictates that it should be adopted.

III

Stopping short of calling the "profits" interpretation absurd, the Government contends that the interpretation should nonetheless be rejected because it fails to give the federal money-laundering statute its proper scope and because it hinders effective enforcement of the law. Neither contention overcomes the rule of lenity.

A

According to the Government, if we do not read "proceeds" to mean "receipts," we will disserve the purpose of the federal money-laundering statute, which is, the Government says, to penalize criminals who conceal or promote their illegal activities. On the Government's view, "[t]he gross receipts of a crime accurately reflect the scale of the criminal activity, because the illegal activity generated all of the

funds." Brief for United States 21; see also *post*, at 535–537 (ALITO, J., dissenting).

When interpreting a criminal statute, we do not play the part of a mindreader. In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *United States* v. *Wiltberger*, 5 Wheat. 76, 105 (1820). And Justice Frankfurter, writing for the Court in another case, said the following: "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell* v. *United States*, 349 U. S. 81, 83 (1955).

The statutory purpose advanced by the Government to construe "proceeds" is a textbook example of begging the question. To be sure, if "proceeds" meant "receipts," one could say that the statute was aimed at the dangers of concealment and promotion. But whether "proceeds" means "receipts" is the very issue in the case. If "proceeds" means "profits," one could say that the statute is aimed at the distinctive danger that arises from leaving in criminal hands the yield of a crime. A rational Congress could surely have decided that the risk of leveraging one criminal activity into the next poses a greater threat to society than the mere payment of crime-related expenses and justifies the money-laundering statute's harsh penalties.

If we accepted the Government's invitation to speculate about congressional purpose, we would also have to confront and explain the strange consequence of the "receipts" interpretation, which respondents have described as a "merger problem." See, *e. g.*, Brief for Respondent Diaz 34. If "proceeds" meant "receipts," nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery. Since few lotter-

ies, if any, will not pay their winners, the statute criminalizing illegal lotteries, 18 U. S. C. § 1955, would "merge" with the money-laundering statute. Congress evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment, § 1955(a), but as a result of merger they would face an additional 20 years, § 1956(a)(1). Prosecutors, of course, would acquire the discretion to charge the lesser lottery offense, the greater money-laundering offense, or both—which would predictably be used to induce a plea bargain to the lesser charge.

The merger problem is not limited to lottery operators. For a host of predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime. Few crimes are entirely free of cost, and costs are not always paid in advance. Anyone who pays for the costs of a crime with its proceeds—for example, the felon who uses the stolen money to pay for the rented getaway car—would violate the money-laundering statute. And any wealth-acquiring crime with multiple participants would become money laundering when the initial recipient of the wealth gives his confederates their shares.[4] Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, would merge with money laundering. There are more than 250 predicate offenses for the money-laundering statute, see Dept. of Justice, Bureau of Justice Statistics, M. Motivans, Money Laundering Offenders, 1994–2001, p. 2 (2003), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/mlo01.pdf (as visited May 29, 2008, and available in Clerk

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[4]The Solicitor General suggests that this is the case even under the "profits" interpretation. See Reply Brief for United States 16; see also *post*, at 545 (ALITO, J., dissenting). That is not so, because when the "loot" comes into the hands of the later distributing felon his confederates' shares are (as to him) not profits but mere receipts subject to his payment of expenses.

of Court's case file), and many foreseeably entail such transactions, see 18 U. S. C. §1956(c)(7) (2000 ed. and Supp. V) (establishing as predicate offenses a number of illegal trafficking and selling offenses, the expenses of which might be paid after the illegal transportation or sale).

The Government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime. Interpreting "proceeds" to mean "profits" eliminates the merger problem. Transactions that normally occur during the course of running a lottery are not identifiable uses of profits and thus do not violate the money-laundering statute. More generally, a criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money-laundering statute, because by definition profits consist of what remains after expenses are paid. Defraying an activity's costs with its receipts simply will not be covered.

The principal dissent suggests that a solution to the merger problem may be found in giving a narrow interpretation to the "promotion prong" of the statute: A defendant might be deemed not to "promote" illegal activity "by doing those things . . . that are needed merely to keep the business running," *post*, at 547–548, because promotion (presumably) means doing things that will cause a business to grow. See Webster's 2d, at 1981 (giving as one of the meanings of "promote" "[t]o contribute to the growth [or] enlargement" of something). (This argument is embraced by JUSTICE BREYER's dissent as well. See *post*, at 530.) The federal money-laundering statute, however, bars not the bare act of promotion, but engaging in certain transactions "with the intent to promote *the carrying on* of specified unlawful activity." 18 U. S. C. §1956(a)(1)(A)(i) (2000 ed.) (emphasis added). In that context the word naturally bears one of its other meanings, such as "[t]o contribute to the . . . prosper-

ity" of something, or to "further" something. See Webster's 2d, at 1981. Surely one promotes "the carrying on" of a gambling enterprise by merely ensuring that it continues in business.[5] In any event, to believe that this "narrow" interpretation of "promote" would solve the merger problem one must share the dissent's misperception that the statute applies just to the conduct of ongoing enterprises rather than individual unlawful acts. If the predicate act is theft by an individual, it makes no sense to ask whether an expenditure was intended to "grow" the culprit's theft business. The merger problem thus stands as a major obstacle to the dissent's interpretation of "proceeds."

JUSTICE BREYER admits that the merger problem casts doubt on the Government's position, *post*, at 529, but believes there are "other, more legally felicitous" solutions to the problem, *post*, at 530. He suggests that the merger problem could be solved by holding that "the money laundering offense and the underlying offense that generated the money to be laundered must be distinct in order to be separately punishable." *Ibid.* The insuperable difficulty with this solution is that it has no basis whatever in the words of the statute. Even assuming (as one should not) the propriety of a judicial rewrite, why should one believe that Congress wanted courts to avoid the merger problem in that unusual fashion, rather than by adopting one of the two possible meanings of an ambiguous term? JUSTICE BREYER pins

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[5] We note in passing the peculiarity that a dissent which rejects our interpretation of "proceeds" because knowledge of profits will be difficult to prove, suggests an interpretation of "promotes" that will require proving that a particular expenditure was intended, not merely to keep a business "running," but to expand it. ("You must decide, ladies and gentlemen of the jury, whether it is true beyond a reasonable doubt that the payoff of this winning bettor was not simply motivated by a desire to bring him and other current gambling customers back, but was meant to create a reputation for reliable payoff that would attract future customers.")

hope on the possibility, "if the 'merger' problem is essentially a problem of fairness in sentencing," that the United States Sentencing Commission might revise its recommended sentences for money laundering. *Ibid.* See also principal dissent, *post*, at 547 (in agreement). Even if that is a possibility, it is not a certainty. And once again, why should one choose this chancy method of solving the problem, rather than interpret ambiguous language to avoid it? In any event, as noted, *supra*, at 515–516, the merger problem affects more than just sentencing; it affects charging decisions and plea bargaining as well.

B

The Government also argues for the "receipts" interpretation because—quite frankly—it is easier to prosecute. Proving the proceeds and knowledge elements of the federal money-laundering offense under the "profits" interpretation will unquestionably require proof that is more difficult to obtain. Essentially, the Government asks us to resolve the statutory ambiguity in light of Congress's presumptive intent to facilitate money-laundering prosecutions. That position turns the rule of lenity upside down. We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.

It is true that the "profits" interpretation demands more from the Government than the "receipts" interpretation. Not so much more, however, as to render such a disposition inconceivable—as proved by the fact that Congress has imposed similar proof burdens upon the prosecution elsewhere. See 18 U. S. C. § 1963(a) (criminal forfeiture provision requiring determination of "gross profits or other proceeds"); 21 U. S. C. § 853(a) (same).[6] It is untrue that the added burdens

[6] The principal dissent claims that these statutes do not require proof of profits because the Government could rely upon the "other proceeds" prong, which the dissent interprets to mean *all* proceeds, gross profits and everything else. See *post*, at 545. We do not normally interpret a text in

"serve no discernible purpose." *Post*, at 542 (ALITO, J., dissenting). They ensure that the severe money-laundering penalties will be imposed only for the removal of profits from criminal activity, which permit the leveraging of one criminal activity into the next. See *supra*, at 515.

In any event, the Government exaggerates the difficulties. The "proceeds of specified unlawful activity" are the proceeds from the conduct sufficient to prove *one* predicate offense. Thus, to establish the proceeds element under the "profits" interpretation, the prosecution needs to show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction. And the Government, of course, can select the instances for which the profitability is clearest. Contrary to the principal dissent's view, *post*, at 536, 540–542, the fact-finder will not need to consider gains, expenses, and losses attributable to other instances of specified unlawful activity, which go to the profitability of some entire criminal enterprise. What counts is whether the receipts from the charged unlawful act exceeded the costs fairly attributable to it.[7]

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a manner that makes one of its provisions superfluous. But even if we did, these provisions would still establish what the dissent believes unthinkable: that Congress could envision the Government's proving profits.

[7]The principal dissent asks, "[H]ow long does each gambling 'instance' last?" *Post*, at 543. The answer is "as long as the Government chooses to charge." Title 18 U. S. C. § 1955(a) provides that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both." An illegal gambling business is an illegal gambling business during each moment of its operation, and it will be up to the Government to select that period of time for which it can most readily establish the necessary elements of the charged offenses, including (if money laundering is one of them) profitability. (To the extent this raises the possibility of the Government's making multiple violations out of one person's running of a single business, that problem arises no matter what definition of "proceeds" is adopted.) The "preposterous results" that the dissent attributes to our interpretation of "proceeds," *post*, at 544, are in fact the consequence of the Government's decision to charge Santos

When the Government charges an "enterprise" crime as the predicate offense, see, *e. g.*, 18 U. S. C. §1956(c)(7)(C), it will have to prove the profitability of only the conduct sufficient to violate the enterprise statute. That is typically defined as a "continuing series of violations," 21 U. S. C. §848(c)(2), which would presumably be satisfied by three violations, see *Richardson* v. *United States*, 526 U. S. 813, 818 (1999). Thus, the Government will have to prove the profitability of just three offenses, selecting (again) those for which profitability is clearest. And of course a prosecutor will often be able to charge the underlying crimes instead of the overarching enterprise crime.

As for the knowledge element of the money-laundering offense—knowledge that the transaction involves profits of unlawful activity—that will be provable (as knowledge must almost always be proved) by circumstantial evidence. For example, someone accepting receipts from what he knows to be a long-continuing drug-dealing operation can be found to know that they include some profits. And a jury could infer from a long-running launderer-criminal relationship that the launderer knew he was hiding the criminal's profits. Moreover, the Government will be entitled to a willful blindness instruction if the professional money launderer, aware of a high probability that the laundered funds were profits, deliberately avoids learning the truth about them—as might be the case when he knows that the underlying crime is one that is rarely unprofitable.

IV

Concurring in the judgment, JUSTICE STEVENS expresses the view that the rule of lenity applies to this case because there is no legislative history reflecting any legislator's belief

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with conducting a gambling business over a 6-year period. Of course in the vast majority of cases, establishing the profitability of the predicate offense will not put the Government to the task of identifying the relevant period. Most criminal statutes prohibit discrete, individual acts (fraud, bank robbery) rather than the conduct of a business.

about how the money-laundering statute should apply to lottery operators. See *post*, at 526, 528. The rule of lenity might not apply, he thinks, in a case involving an organized crime syndicate or the sale of contraband because the legislative history supposedly contains some views on the meaning of "proceeds" in those circumstances.[8] See *post*, at 525–526, and n. 3. In short, JUSTICE STEVENS would interpret "proceeds" to mean "profits" for some predicate crimes, "receipts" for others.

JUSTICE STEVENS' position is original with him; neither the United States nor any *amicus* suggested it; it has no precedent in our cases. JUSTICE STEVENS relies on the proposition that one undefined word, repeated in different statutory provisions, can have different meanings in each provision. See *post*, at 525, and n. 2. But that is worlds apart from giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*. Not only have we never engaged in such interpretive contortion; just over three years ago, in an opinion joined by JUSTICE STEVENS, we forcefully rejected it. *Clark* v. *Martinez*, 543 U. S. 371 (2005), held that the meaning of words in a statute cannot change with the statute's application. See *id.*, at 378. To hold otherwise "would render every statute a chameleon," *id.*, at 382, and "would establish within our jurisprudence . . . the dangerous principle that judges can give the same statu-

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[8]JUSTICE STEVENS fails to identify the legislative history to which he refers. He offers only: "As JUSTICE ALITO rightly argues, the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Post*, at 525–526. Although JUSTICE ALITO, from one item of legislative history, draws an inference about the meaning of "proceeds" in all its applications (which we find dubious, see n. 3, *supra*), nowhere does he cite legislative history addressing the meaning of the word "proceeds" in cases specifically involving contraband or organized crime. Thus JUSTICE STEVENS' concurrence appears to address not only a hypothetical case, see *infra*, at 523, but even an imagined legislative history.

tory text different meanings in different cases," *id.*, at 386. Precisely to avoid that result, our cases often "give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. *The lowest common denominator, as it were, must govern.*" *Id.*, at 380 (emphasis added).

Our obligation to maintain the consistent meaning of words in statutory text does not disappear when the rule of lenity is involved. To the contrary, we have resolved an ambiguity in a tax statute in favor of the taxpayer in a civil case because the statute had criminal applications that triggered the rule of lenity. See *United States* v. *Thompson/Center Arms Co.*, 504 U. S. 505, 517–518, and n. 10 (1992) (plurality opinion). If anything, the rule of lenity is an additional reason to remain consistent, lest those subject to the criminal law be misled. And even if, as JUSTICE STEVENS contends, *post*, at 524, statutory ambiguity "effectively" licenses us to write a brand-new law, we cannot accept that power in a criminal case, where the law must be written by Congress. See *United States* v. *Hudson*, 7 Cranch 32, 34 (1812).

We think it appropriate to add a word concerning the *stare decisis* effect of JUSTICE STEVENS' opinion. Since his vote is necessary to our judgment, and since his opinion rests upon the narrower ground, the Court's holding is limited accordingly. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). But the narrowness of his ground consists of finding that "proceeds" means "profits" when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist. JUSTICE STEVENS' speculations on that point address a case that is not before him, are the purest of dicta, and form no part of today's holding. Thus, as far as this particular statute is concerned, counsel remain free to argue JUSTICE STEVENS' view (and to explain

why it does not overrule *Clark* v. *Martinez*, *supra*). They should be warned, however: Not only do the Justices joining this opinion reject that view, but so also (apparently) do the Justices joining the principal dissent. See *post*, at 532, 546.

V

The money-laundering charges brought against Santos were based on his payments to the lottery winners and his employees, and the money-laundering charge brought against Diaz was based on his receipt of payments as an employee. Neither type of transaction can fairly be characterized as involving the lottery's profits. Indeed, the Government did not try to prove, and respondents have not admitted, that they laundered criminal profits. We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

When Congress fails to define potentially ambiguous statutory terms, it effectively delegates to federal judges the task of filling gaps in a statute. See *Commissioner* v. *Fink*, 483 U. S. 89, 104 (1987) (STEVENS, J., dissenting) ("In the process of legislating it is inevitable that Congress will leave open spaces in the law that the courts are implicitly authorized to fill"). Congress has included definitions of the term "proceeds" in some criminal statutes,[1] but it has not done so in 18 U. S. C. § 1956 (2000 ed. and Supp. V), the money laundering statute at issue in this case. That statute is somewhat unique because it applies to the proceeds of a varied and lengthy list of specified unlawful activities, see § 1956(c)(7) (defining "specified unlawful activity" to include, *inter alia*,

[1] For example, 18 U. S. C. § 2339C(e)(3) (2000 ed., Supp. V), which prohibits the concealment of proceeds derived from funds used to support terrorism, defines "proceeds" to mean "any funds derived from or obtained, directly or indirectly, through the commission of [the] offense."

controlled substance violations, murder, bribery, smuggling, various forms of fraud, concealment of assets, various environmental offenses, and health care offenses).

Although it did not do so, it seems clear that Congress could have provided that the term "proceeds" shall have one meaning when referring to some specified unlawful activities and a different meaning when referring to others. In fact, in the general civil forfeiture statute, §981, Congress did provide two different definitions of "proceeds," recognizing that—for a subset of activities—"proceeds" must allow for the deduction of costs. Compare §981(a)(2)(A) (2000 ed.) (defining "proceeds" in cases involving illegal goods and services to mean "property of any kind obtained directly or indirectly . . . not limited to the net gain or profit realized from the offense") with §981(a)(2)(B) (defining "proceeds" with respect to lawful goods sold in an illegal manner as the amount of money acquired "less the direct costs incurred in providing the goods or services").

We have previously recognized that the same word can have different meanings in the same statute.[2] If Congress could have expressly defined the term "proceeds" differently when applied to different specified unlawful activities, it seems to me that judges filling the gap in a statute with such a variety of applications may also do so, as long as they are conscientiously endeavoring to carry out the intent of Congress. Therefore, contrary to what JUSTICE ALITO and the plurality state, see *post*, at 546 (dissenting opinion); *ante*, at 522–523 (plurality opinion), this Court need not pick a single definition of "proceeds" applicable to every unlawful activity, no matter how incongruous some applications may be.

As JUSTICE ALITO rightly argues, the legislative history of §1956 makes it clear that Congress intended the term

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[2] See, *e. g.*, *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 595 (2004) (rejecting the presumption that the term "age" had an identical meaning throughout the Age Discrimination in Employment Act of 1967).

"proceeds" to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.[3] But that history sheds no light on how to identify the proceeds of many other types of specified unlawful activities. For example, one specified unlawful activity is the conduct proscribed by § 541, "Entry of goods falsely classified." Section 541 provides that "[w]hoever knowingly effects any entry of goods, wares, or merchandise, at less than the true weight or measure thereof, or upon a false classification as to quality or value, or by the payment of less than the amount of duty legally due, shall be . . . imprisoned not more than two years." Conceivably the "proceeds" stemming from a violation of § 541 could be either the money realized by misstating the value—that is, the amount by which the criminal "profits" by paying reduced duties—or the total price at which the goods are later sold, even though the misclassification had only a trivial impact on that price.

Just as the legislative history fails to tell us how to calculate the "proceeds" of violations of § 541, it is equally silent on the proceeds of an unlicensed stand-alone gambling venture. The consequences of applying a "gross receipts" definition of "proceeds" to the gambling operation conducted by respondents are so perverse that I cannot believe they were contemplated by Congress, particularly given the fact that nothing in JUSTICE ALITO's thorough review of the legislative history indicates otherwise.[4]

Constrained by a holding that the payment of expenses constitutes "promotion,"[5] JUSTICE ALITO's opinion runs

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[3] Thus, I cannot agree with the plurality that the rule of lenity must apply to the definition of "proceeds" for these types of unlawful activities.

[4] As JUSTICE ALITO notes, some reference was made in the legislative history to gambling as a part of a broader criminal syndicate's activities. *Post*, at 539–540. But that reference does not indicate that Congress intended the "proceeds" of a gambling business to include gross receipts.

[5] The Seventh Circuit held on a prior appeal that respondent Santos' actions were legally sufficient to convict him of promoting the carrying on of a business under § 1956, *United States* v. *Febus*, 218 F. 3d 784, 789–790

squarely into what can be characterized as the "merger" problem. Allowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect tantamount to double jeopardy, which is particularly unfair in this case because the penalties for money laundering are substantially more severe than those for the underlying offense of operating a gambling business. A money laundering conviction increases the statutory maximum from 5 to 20 years, and the Sentencing Commission has prescribed different Guidelines ranges for the two crimes.[6] When a defendant has a significant criminal history or Guidelines enhancements apply, the statutory cap of five years in § 1955 is an important limitation on a defendant's sentence—a limitation that would be eviscerated if JUSTICE ALITO's definition of "proceeds" were applied in this case.

JUSTICE ALITO and JUSTICE BREYER suggest that the advisory nature of the Guidelines post-*Booker*, *United States* v. *Booker*, 543 U. S. 220 (2005), or the possibility of an amendment to the money laundering Guideline, would soften this blow, *post*, at 547 (opinion of ALITO, J.); *post*, at 530–531 (dissenting opinion of BREYER, J.), and indeed they could. But the result in the case at hand might not be softened at all

(2000). JUSTICE ALITO criticizes the plurality for allowing the interpretation of "proceeds" to be "dictated by an unreviewed interpretation of another statutory element." See *post*, at 548. I do not base my opinion on any disagreement with the interpretation of "promotion."

[6] For example, under the 2007 Guidelines, the base offense level for running a gambling business is 12. United States Sentencing Commission, Guidelines Manual § 2E3.1 (Nov. 2007) (USSG). Section 2S1.1, which provides the base offense level for money laundering, adds two levels to the base offense level for the underlying crime where the defendant is convicted under 18 U. S. C. § 1956. This scheme for determining the base offense level first appeared in the November 2001 Sentencing Guidelines. Prior to 2001, the difference between sentences for gambling and money laundering was even more pronounced, as USSG § 2S1.1 (Nov. 2000) set an offense level of 23, which could be increased if the value of the funds exceeded $100,000.

by resort to *Booker* because respondents' direct appeal was decided in 2000, several years prior to our decision in *Booker*. If JUSTICE ALITO's opinion were to carry the day, both respondents would return to prison to serve the remainder of their lengthy sentences.

The revenue generated by a gambling business that is used to pay the essential expenses of operating that business is not "proceeds" within the meaning of the money laundering statute. As the plurality notes, there is "no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime." *Ante*, at 517. This conclusion dovetails with what common sense and the rule of lenity would require. Faced with both a lack of legislative history speaking to the definition of "proceeds" when operating a gambling business is the "specified unlawful activity" and my conviction that Congress could not have intended the perverse result that would obtain in this case under JUSTICE ALITO's opinion, the rule of lenity may weigh in the determination. And in that respect the plurality's opinion is surely persuasive.[7] Accordingly, I concur in the judgment.

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[7] In what can only be characterized as the "purest of dicta," the plurality speculates about the *stare decisis* effect of our judgment and interprets my conclusion as resting on the ground that "'proceeds' means 'profits' when there is no legislative history to the contrary." *Ante*, at 523. That is not correct; my conclusion rests on my conviction that Congress could not have intended the perverse result that the dissent's rule would produce if its definition of "proceeds" were applied to the operation of an unlicensed gambling business. In other applications of the statute not involving such a perverse result, I would presume that the legislative history summarized by JUSTICE ALITO reflects the intent of the enacting Congress. See *post*, at 531–532, and n. 1. Its decision to leave the term undefined is consistent with my view that "proceeds" need not be given the same definition when applied to each of the numerous specified unlawful activities that produce unclean money. *Clark* v. *Martinez*, 543 U. S. 371 (2005), poses no barrier to this conclusion. In *Martinez* there was no

JUSTICE BREYER, dissenting.

I join JUSTICE ALITO's dissent while adding the following observations about what has been referred to as the "'merger problem.'" *Ante*, at 515 (plurality opinion). Like the plurality, I doubt that Congress intended the money laundering statute automatically to cover financial transactions that constitute an essential part of a different underlying crime. Operating an illegal gambling business, for example, inevitably involves investment in overhead as well as payments to employees and winning customers; a drug offense normally involves payment for drugs; and bank robbery may well require the distribution of stolen cash to confederates. If the money laundering statute applies to this kind of transaction (*i. e.*, if the transaction is automatically a "financial transaction" that "involves the proceeds of specified unlawful activity" made "with the intent to promote the carrying on of specified unlawful activity"), then the Government can seek a heavier money laundering penalty (say, 20 years), even though the only conduct at issue is conduct that warranted a lighter penalty (say, 5 years for illegal gambling). 18 U. S. C. § 1956(a)(1).

It is difficult to understand why Congress would have intended the Government to possess this punishment-transforming power. Perhaps for this reason, the Tenth Circuit has written that "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.'" *United States* v. *Edgmon*, 952 F. 2d 1206, 1214 (1991). And, in 1997, the United States Sentencing Commission told Congress that it agreed with the Department of Justice that "money laundering cannot properly be charged for 'merged' transactions that are part of the underlying crime." Report to Congress:

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compelling reason—in stark contrast to the situation here—to believe that Congress intended the result for which the Government argued.

Sentencing Policy for Money Laundering Offenses, including Comments on Dept. of Justice Report, p. 16 (Sept. 1997), online at http://www.ussc.gov/r_congress/launder.pdf (as visited May 20, 2008, and available in Clerk of Court's case file).

Thus, like the plurality, I see a "merger" problem. But, unlike the plurality, I do not believe that we should look to the word "proceeds" for a solution. For one thing, the plurality's interpretation of that word creates the serious logical and practical difficulties that JUSTICE ALITO describes. See *post*, at 537–542 (dissenting opinion) (describing difficulties associated with proof and accounting). For another thing, there are other, more legally felicitous places to look for a solution. The Tenth Circuit, for example, has simply held that the money laundering offense and the underlying offense that generated the money to be laundered must be distinct in order to be separately punishable. *Edgmon*, *supra*, at 1214. Alternatively the money laundering statute's phrase "with the intent *to promote* the carrying on of specified unlawful activity" may not apply where, for example, only one instance of that underlying activity is at issue. (The Seventh Circuit on a prior appeal in this case rejected that argument, and thus we do not consider it here. See *United States* v. *Febus*, 218 F. 3d 784, 789 (2000).)

Finally, if the "merger" problem is essentially a problem of fairness in sentencing, the Sentencing Commission has adequate authority to address it. Congress has instructed the Commission to "avoi[d] unwarranted sentencing disparities" among those "found guilty of *similar criminal conduct*." 28 U. S. C. §991(b)(1)(B) (emphasis added); see also §994(f) (instructing the Commission to pay particular attention to those disparities). The current money laundering Guideline, United States Sentencing Commission, Guidelines Manual §2S1.1 (Nov. 2007), by making no exception for a situation where *nothing but a single instance of the underlying crime has taken place*, would seem to create a serious and unwarranted disparity among defendants who have engaged in

identical conduct. My hope is that the Commission's past efforts to tie more closely the offense level for money laundering to the offense level of the underlying crime, see *id.*, Supp. to App. C, Amdt. 634 (Nov. 2001), suggest a willingness to consider directly this kind of disparity. Such an approach could solve the "merger" problem without resort to creating complex interpretations of the statute's language. And any such solution could be applied retroactively. See 28 U. S. C. § 994(u).

In light of these alternative possibilities, I dissent.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

Fairly read, the term "proceeds," as used in the principal federal money laundering statute, 18 U. S. C. § 1956(a), means "the total amount brought in," the primary dictionary definition. Webster's Third New International Dictionary 1807 (1976) (hereinafter Webster's 3d). See also Random House Dictionary of the English Language 1542 (2d ed. 1987) ("the total amount derived from a sale or other transaction"). The plurality opinion, however, makes no serious effort to interpret this important statutory term. Ignoring the context in which the term is used, the problems that the money laundering statute was enacted to address, and the obvious practical considerations that those responsible for drafting the statute almost certainly had in mind, that opinion is quick to pronounce the term hopelessly ambiguous and thus to invoke the rule of lenity. Concluding that "proceeds" means "profits," the plurality opinion's interpretation would frustrate Congress' intent and maim a statute that was enacted as an important defense against organized criminal enterprises.

Fortunately, JUSTICE STEVENS' opinion recognizes that the term "proceeds" "include[s] gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Ante*, at 526 (opinion concur-

ring in judgment).[1] I cannot agree with JUSTICE STEVENS' approach insofar as it holds that the meaning of the term "proceeds" varies depending on the nature of the illegal activity that produces the laundered funds, but at least that approach preserves the correct interpretation of the statute in most of the cases that were the focus of congressional concern when the money laundering statute was enacted.

I

A

While the primary definition of the term "proceeds" is "the total amount brought in," I recognize that the term may also be used to mean "net profit," Webster's 3d 1807, and I do not suggest that the question presented in this case can be answered simply by opening a dictionary. When a word has more than one meaning, the meaning that is intended is often made clear by the context in which the word is used, and thus in this case, upon finding that the term "proceeds" may mean both "the total amount brought in" and "net profit," the appropriate next step is not to abandon any effort at interpretation and summon in the rule of lenity. Rather, the next thing to do is to ask what the term "proceeds" customarily means in the context that is relevant here—a money laundering statute.

The federal money laundering statute is not the only money laundering provision that uses the term "proceeds." On the contrary, the term is a staple of money laundering laws, and it is instructive that in every single one of these provisions in which the term "proceeds" is defined—and there are many—the law specifies that "proceeds" means "the total amount brought in."

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[1] In light of the plurality opinion's discussion of "the *stare decisis* effect of JUSTICE STEVENS' opinion," *ante*, at 523, it must be noted that five Justices agree with the position taken by JUSTICE STEVENS on the matter discussed in the preceding sentence of the text.

The leading treaty on international money laundering, the United Nations Convention Against Transnational Organized Crime (Convention), Nov. 15, 2000, 2225 U. N. T. S. 209 (Treaty No. I–39574), which has been adopted by the United States and 146 other countries,[2] is instructive. This treaty contains a provision that is very similar to § 1956(a)(1)(B)(i). Article 6.1 of the Convention obligates signatory nations to criminalize "[t]he . . . transfer of property, knowing that such property is *the proceeds of crime*, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action." *Id.*, at 277 (emphasis added). The Convention defines the term "proceeds" to mean "any property derived from or obtained, directly or indirectly, through the commission of an offence." *Id.*, at 275 (Art. 2(e)). The money laundering provision of the Convention thus covers gross receipts.[3] The term "proceeds" is given a similarly broad scope in the Model Money Laundering Act (Model Act). See President's Commission on Model State Drug Laws, Economic Remedies § C (1993). Section 5(a)(1) of the Model Act criminalizes transactions involving property that is "the proceeds of some form of unlawful activity," and the Model Act defines "proceeds" as "property acquired or derived directly

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[2] See Multilateral Treaties Deposited With the Secretary-General, pt. I, ch. XVIII, No. 12, United Nations Convention Against Transnational Crime (Nov. 15, 2000), online at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty13.asp (all Internet materials as visited May 29, 2008, and available in Clerk of Court's case file).

[3] If 18 U. S. C. § 1956 were limited to profits, it would be narrower than the obligation that the United States undertook in Article 6.1 of the Convention, but the Department of State has taken the position that no new legislation is needed to bring the United States into compliance. See Hearing on Law Enforcement Treaties before the Senate Committee on Foreign Relations, 108th Cong., 2d Sess., 10 (2004) (statement of Samuel M. Witten, Deputy Legal Adviser) ("[W]e can comply with the Convention's criminalization obligations without need for new legislation").

or indirectly from, produced through, realized through, or caused by an act or omission . . . includ[ing] any property of any kind," § 4(a).

Fourteen States have money laundering statutes that define the term "proceeds," and in every one of these laws the term is defined in a way that encompasses gross receipts. See Ariz. Rev. Stat. Ann. §§ 13–2314(N)(3) (West 2001), 13–2317(F)(4)(b) (West Supp. 2007); Ark. Code Ann. § 5–42–203(5) (2006); Cal. Health & Safety Code Ann. § 11370.9(h)(1) (West 2007); Haw. Rev. Stat. §§ 708A–2, 708A–3 (2006 Supp.); Ind. Code §§ 35–45–15–4, 35–45–15–5 (West 2004); Iowa Code §§ 706B.1(1), 706B.2 (2005); La. Stat. Ann. § 14:230(A)(4) (West 2004); Mich. Comp. Laws Ann. §§ 750.411j(f), 750.411k (West 2004); N. M. Stat. Ann. §§ 30–51–2(E), 30–51–4(A) (2004); Ohio Rev. Code Ann. §§ 1315.51(H), 1315.55 (Lexis 2006); Tex. Penal Code Ann. §§ 34.01(4), 34.02 (West Supp. 2007); Utah Code Ann. §§ 76–10–1902(9), 76–10–1903 (Lexis 2007); Va. Code Ann. §§ 18.2–246.2, 18.2–246.3 (Lexis 2004); Wash. Rev. Code §§ 9A.83.010(5), 9A.83.020 (2006). Cf. N. J. Stat. Ann. § 2C:21–25(d) (West 2005).[4]

This pattern of usage is revealing. It strongly suggests that when lawmakers, knowledgeable about the nature and problem of money laundering, use the term "proceeds" in a

[4] Connecticut, the only State with a money laundering statute that does not use the term "proceeds," uses equivalent language that is not limited to profits. See Conn. Gen. Stat. § 53a–276 (2005) ("A person is guilty of money laundering in the first degree when he exchanges . . . one or more monetary instruments derived from criminal conduct constituting a felony"). I have found no money laundering statute that defines "proceeds" to mean profits or that uses other language that limits the law's reach to profits or net income.

The only state money laundering statute that even uses the term "profits," "net income," or something similar is that of Arkansas, which plainly defines "criminal proceeds" to include all gross receipts of criminal conduct: "'Criminal proceeds' means: (A) Anything of value furnished or intended to be furnished in exchange for criminal conduct or contraband received in violation of state or federal law; and (B) Property or profits traceable to" such an exchange. Ark. Code Ann. § 5–42–203(5).

money laundering provision, they customarily mean for the term to reach all receipts and not just profits.[5]

B

There is a very good reason for this uniform pattern of usage. Money laundering provisions serve two chief ends. First, they provide deterrence by preventing drug traffickers and other criminals who amass large quantities of cash from using these funds "to support a luxurious lifestyle" or otherwise to enjoy the fruits of their crimes. Model Act, Policy Statement, at C–105. See President's Commission on Organized Crime, Interim Report to President and Attorney General, The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 7–8 (Oct. 1984) (hereinafter Interim Report); Aranson, Bouker, & Hannan, Money Laundering, 31 Am. Crim. L. Rev. 721, 722 (1994); H. R. Rep. No. 99–746, p. 16 (1986) (hereinafter H. R. Rep.). Second, they inhibit the growth of criminal enterprises by preventing

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[5]The version of the money laundering statute originally passed by the House reflected a similar legislative judgment. The bill made it a crime to engage in financial transactions and certain commercial transactions involving "criminally derived property that is derived from a designated offense." H. R. 5484, 99th Cong., 2d Sess., §602, p. 154 (1986) (as introduced). The term "criminally derived property" is naturally understood to include all property that is "receive[d]" or "obtain[ed]" as a result of criminal activity, see Webster's 3d 608; Random House Dictionary of the English Language 389 (1967), and thus to include all gross receipts and not just profit. The House bill defined the term "criminally derived property" to mean "any property constituting, or derived from, *proceeds* obtained from a criminal offense." H. R. 5484, §602, at 158 (emphasis added). Accordingly, the House seems to have understood "proceeds" to include gross receipts.

The bill passed by the Senate, like the current money laundering statute, simply used the term "proceeds," S. 2683, 99th Cong., 2d Sess., §2(a) (1986), and the House acceded to the Senate version. See H. R. 5484, 99th Cong., 2d Sess., §1352, p. 48 (1986) (as enacted). There is no suggestion in the legislative history that the term "criminally derived property" and the term "proceeds" were perceived as having different meanings.

the use of dirty money to promote the enterprise's growth. See, *e. g.*, 18 U. S. C. §§1956(a)(1)(A)(i), (a)(2)(A), and (a)(3)(A); Model Act §§5(a)(2), (4); N. J. Stat. Ann. §2C:21–25(b)(1); Tex. Penal Code Ann. §§34.02(a)(3)–(4).

Both of these objectives are frustrated if a money laundering statute is limited to profits. Dirty money may be used to support "a luxurious lifestyle" and to grow an illegal enterprise whenever the enterprise possesses large amounts of illegally obtained cash. And illegal enterprises may acquire such cash while engaging in unlawful activity that is unprofitable.

Suppose, for example, that a drug cartel sends a large shipment of drugs to this country, a good part of the shipment is intercepted, the remainder is sold, the cartel ends up with a net loss but with a large quantity of cash on its hands, and the cartel uses the cash in financial transactions that are designed to conceal the source of the cash or to promote further crime. There is no plausible reason why Congress would not have wanted the money laundering statute to apply to these financial transactions. If the cartel leaders use the money to live in luxury, this provides an incentive for these individuals to stay in the business and for others to enter. If the cartel uses the money to finance future drug shipments or to expand the business, public safety is harmed.

It is certainly true that Congress, in enacting the federal money laundering statute, was primarily concerned about criminal enterprises that realize profits. A criminal operation that consistently loses money will not last very long and thus presents a lesser danger than a profitable operation. But narrowing a money laundering statute so that it reaches only profits produces two perverse results that Congress cannot have wanted. First, it immunizes successful criminal enterprises during those periods when they are operating temporarily in the red. Second, and more important, it introduces pointless and difficult problems of proof. Because

the dangers presented by money laundering are present whenever criminals have large stores of illegally derived funds on their hands, there is little reason to require proof—which may be harder to assemble than the plurality opinion acknowledges—that the funds represent profits.

C

The implausibility of a net income interpretation is highlighted in cases involving professionals and others who are hired to launder money. Those who are knowledgeable about money laundering stress the importance of prosecuting these hired money launderers. See, *e. g.*, Depts. of Treasury and Justice, The 2001 National Money Laundering Strategy, pp. ix–x, 1–2 (Sept. 2001), online at http://www.treas.gov/press/releases/docs/ml2001.pdf; Financial Action Task Force on Money Laundering, 1996–1997 Report on Money Laundering Typologies 7 (Feb. 1997), online at http://www.fatf-gafi.org/dataoecd/31/29/34043795.pdf; Butterworths International Guide to Money Laundering Law and Practice 629 (T. Graham 2d ed. 2003); Ratliff, Third-Party Money Laundering: Problems of Proof and Prosecutorial Discretion, 7 Stan. L. & Pol'y Rev. 173 (1996); Sultzer, Money Laundering: The Scope of the Problem and Attempts to Combat It, 63 Tenn. L. Rev. 143, 147–148 (1995); H. R. Rep., at 16–17.

A net income interpretation would risk hamstringing such prosecutions. To violate 18 U. S. C. § 1956(a)(1), a defendant must "kno[w] that the property involved in a financial transaction represents the proceeds of some form of unlawful activity." A professional money launderer is not likely to know (or perhaps even to care) whether the enterprise is operating in the black when the funds in question were acquired. Therefore, under a net income interpretation, financial specialists and others who are hired to launder funds would generally be beyond the reach of the statute, something that Congress almost certainly did not intend.

It is revealing that the money laundering statute explicitly provides that a money launderer need only know that "the property involved in the transaction represented proceeds from some form, though not necessarily which form, of [specified illegal] activity." § 1956(c)(1). Thus, the prosecution is not required to prove that a hired money launderer knew that funds provided for laundering derived from, say, drug sales as opposed to gambling. There is no reason to think that hired money launderers are more likely to know whether funds include profits than they are to know the nature of the illegal activity from which the funds were derived. Consequently, § 1956(c) suggests that Congress did not intend to require proof that a hired money launderer knew that funds provided for laundering included profits.

The plurality opinion dismisses these concerns with the observation that a jury may infer that a hired launderer knew that funds included profits if the launderer had a long-running relationship with the entity or person providing the funds or knew that the entity or person had been involved in the illegal enterprise for a lengthy period. See *ante*, at 521. But what about the case where the launderer accepts a million dollars of drug money on a single occasion? And even if there would be legally sufficient evidence to support an inference of the requisite knowledge under the circumstances that the plurality opinion posits, the requirement of convincing a jury to find beyond a reasonable doubt that the funds included profits would pose a troublesome and (in light of the aim of the money laundering statute) pointless obstacle.

D

Even in cases in which the defendants are alleged to have been involved in the underlying criminal activity, a net income interpretation would produce nettlesome problems that Congress cannot have wanted. These problems may be especially acute in the very cases that money laundering statutes principally target, that is, cases involving large-scale

criminal operations that continue over a substantial period of time, particularly drug cartels and other organized crime syndicates.

The federal money laundering statute was enacted in the wake of an influential report by the President's Commission on Organized Crime that focused squarely on criminal enterprises of this type. See Interim Report 7–8 (described in S. Rep. No. 99–433, pp. 2–4 (1986) (hereinafter S. Rep.) and H. R. Rep., at 16). The Commission identified drug traffickers and other organized criminal groups as presenting the most serious problems. See Interim Report 7. The Commission found that "narcotics traffickers, who must conceal billions of dollars in cash from detection by the government, create by far the greatest demand for money laundering schemes" but that "numerous other types of activities typical of organized crime, such as loansharking and gambling, also create an appreciable demand for such schemes." *Ibid.* To illustrate the scope and nature of the money laundering problem, a section of the Interim Report was devoted to case studies, most of which involved the laundering of drug money. *Id.*, at 29–49.

As a prime example of the problem of money laundering, the report discussed the so-called "Pizza Connection" case that was prosecuted in federal court in New York City in the 1980's. In that case, the evidence showed that the Sicilian Mafia and organized crime elements in the United States, over a period of many years, imported huge amounts of heroin into this country, sold the heroin here, accumulated millions of dollars of cash, and then laundered the funds by smuggling them overseas in suitcases or funneling the money through a maze of bank accounts. See *id.*, at 31–35; *United States* v. *Casamento*, 887 F. 2d 1141, 1148–1149 (CA2 1989).

Following the issuance of the Interim Report, Congress turned its attention to the problem of money laundering, and much of the discussion focused on the need to prevent laundering by drug and organized crime syndicates. See, *e. g.*,

S. Rep., at 3 (discussing "organized crime 'businesses' such as gambling, prostitution, and loansharking"), 4 ("Money laundering is a crucial financial underpinning of organized crime and narcotics trafficking" (internal quotation marks omitted)); Hearing on Money Laundering Legislation before the Senate Committee on the Judiciary, 99th Cong., 1st Sess., 1 (1985) (statement of Chairman Thurmond), 29 (statement of Sen. Biden), 30 (statement of Sen. DeConcini), 31 (statement of Sen. D'Amato), 53 (statement of Assistant Attorney General Trott).

In light of these concerns, it is most unlikely that Congress meant to enact a money laundering statute that would present daunting obstacles in the very sort of cases that had been identified as presenting the most pressing problems, that is, cases, like the "Pizza Connection" case, in which law enforcement intercepts cash or wire transfers of funds derived from drug sales or other unlawful activity that occurred over a period of time. The plurality opinion's interpretation of the term "proceeds," however, would often produce such problems. Tracing funds back to particular drug sales and proving that these sales were profitable will often prove impossible. See *United States* v. *Bajakajian*, 524 U. S. 321, 351–352 (1998) (KENNEDY, J., dissenting). Indeed, it will often be hard even to establish with any precision the period of time during which the drug sales occurred. But assuming that the Government can prove roughly when the funds were acquired, the next hurdle would be to show that the drug ring had net income during the time when the funds were acquired.

"Net income" means "[t]he excess of revenues over all related expenses for a given period." R. Estes, Dictionary of Accounting 88 (1981) (emphasis deleted). There are no generally accepted accounting principles for determining the net income of illegal enterprises, and therefore, in order to apply a net income interpretation, special accounting rules would have to be developed.

In the drug-money cases that I have been discussing, the courts would have to decide whether the drug syndicate's net income should be calculated on an annual, quarterly, or some other basis. In addition, the courts would be forced to devise rules for determining the scope of the enterprise for which the net income calculation must be performed. Suppose, for example, that there were connections of an uncertain nature or degree between drug operations in different cities or countries. Rules would be needed to determine whether affiliated criminal groups should be regarded as one enterprise or several. And proof regarding the connections between such operations would often be very difficult to obtain. Criminal enterprises do not have papers of incorporation, partnership agreements, or (in most instances) other documents establishing precise business relationships.

Rules would also be needed in order to determine whether particular illegal expenditures should be considered as expenses. In the "Pizza Connection" case, the Sicilian Mafia used its income for such things as the murder of magistrates, police officers, witnesses, and rivals. See, *e. g.*, *Casamento*, *supra*, at 1154–1156; *United States* v. *Gambino*, 809 F. Supp. 1061, 1065–1068 (SDNY 1992). Are these expenditures simply a cost of engaging in the drug trade? Are they business expenses?

If a net income interpretation were taken to its logical conclusion, it presumably would be necessary as well to work out rules for the depreciation of instrumentalities of crime that must occasionally be replaced due to the efforts of law enforcement. But it seems quite implausible that Congress wanted courts or juries in money laundering cases to grapple with questions such as the useful life of, say, a drug processing plant or laboratory or the airplanes and boats that are used to smuggle drugs. And assuming that the accounting issues can ultimately be resolved by the courts, there would remain serious problems of proof. Illegal enterprises gener-

ally do not keep books and records like legitimate businesses do.

It is tempting to dismiss many of the problems noted above on the ground that "everyone knows" that drug cartels, organized crime syndicates, and the like make a profit. But such groups may not operate in the black at all times, and in any event, if net income is an element of the money laundering offense, the prosecution must prove net income beyond a reasonable doubt. The prosecution cannot simply ask the jury to take notice of the fact that these groups are profitable.

My point in citing the accounting and proof problems that would be produced by a net income interpretation is not that the "'receipts'" interpretation is preferable because "it is easier to prosecute," *ante*, at 519 (plurality opinion), but that creating these obstacles would serve no discernible purpose. Even if a drug or gambling ring was temporarily operating in the red during a particular period, the laundering of money acquired during that time would present the same dangers as the laundering of money acquired during times of profit. It is therefore implausible that Congress wanted to throw up such pointless obstacles.

The plurality opinion attempts to minimize all these problems by stating that "to establish the proceeds element under the 'profits' interpretation, the prosecution needs to show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction." *Ante*, at 520. This suggestion ignores both the language of the money laundering statute, which makes no reference to an "instance" of unlawful activity, and the realities of money laundering prosecutions. The prototypical money laundering case is not a case in which a defendant engages in a single, discrete criminal act and then launders the money derived from that act—for example, a case in which a "felon . . . uses . . . stolen money to pay for the rented getaway car." *Ante*, at 516. Rather, the proto-

typical case involves numerous criminal acts that occur over a period of time and the accumulation of funds from all these acts prior to laundering—for example, the organized crime syndicate or drug cartel that amasses large sums before engaging in a laundering transaction.

Take, for example, a case in which a defendant is charged with doing what was done in the "Pizza Connection" case—transferring millions of dollars of drug money overseas, knowing that the funds represent the proceeds of drug trafficking ("some form of unlawful activity") and that the transfer was designed to conceal the origin of the funds. See 18 U. S. C. § 1956(a)(2)(B). In such a case, it is unrealistic to think that individual dollars can be traced back to individual drug sales—or that Congress wanted to require such tracing.

Although the plurality opinion begins by touting the "single instance" theory as a cure for the accounting and proof problems that a "profits" interpretation produces, the plurality's application of the "single instance" theory to the case at hand shows that this theory will not work. In this case, the "unlawful activity" that produced the funds at issue in the substantive money laundering counts was the operation of the Santos lottery,[6] and it is hardly apparent what constitutes a "single instance" of running a gambling business. Did each lottery drawing represent a separate "instance"? Each wager? And how long does each gambling "instance" last? A day? A week? A month?

When the plurality opinion addresses these questions, it turns out that "a single instance" means all instances that are charged, *i. e.*, it means that the Government had to show that receipts exceeded costs during the time the defendant allegedly conducted, financed, etc., the gambling operation. See *ante*, at 520–521, n. 7. Here, since the Indictment alleged that the Santos lottery continued for more than 6 years ("[b]eginning in or about January 1989 and continuing to in

[6] See Indictment in *United States* v. *Almeda*, No. 2:96 CR–044 RL (ND Ind., May 10, 1996), pp. 3, 14–15 (hereinafter Indictment).

or about December 1994, the exact dates being unknown to the Grand Jury"),[7] the plurality would apparently compel the Government to prove that the lottery was profitable over this entire period.

If this is where the "single instance" theory leads, the theory plainly does not solve the accounting and proof problems we have noted. And the plurality's suggestion that the Government had to show that the gambling operation was profitable for this entire period leads to preposterous results. Suppose that the lottery was profitable for the first five years and, at the end of each year, respondents laundered funds derived from the business. Suppose that in the sixth year the business incurred heavy losses—losses so heavy that they wiped out all of the profits from the first five years. According to the plurality, if respondents were found to have operated the lottery during the entire 6-year period, then the financial transactions that occurred at the end of years one, two, three, four, and five would not violate the money laundering statute, even though an accounting done at those times would have come to the conclusion that the funds included profits. That result makes no sense.

Whenever a money laundering indictment charges that the laundered funds derived from an "unlawful activity" that comprehends numerous acts that occurred over a considerable period of time—and that is precisely the situation in many of the types of cases that the money laundering statute principally targeted—the plurality opinion's interpretation will produce difficulties. I have already discussed drug and gambling cases, and similar problems will arise in cases in which the unlawful activity is a form of fraud. For example, the unlawful activity in mail fraud (18 U. S. C. § 1341) is the scheme to defraud, not the individual mailings carried out in furtherance of the scheme. See *Neder* v. *United States*, 527 U. S. 1, 19 (1999); *United States* v. *Mankarious*, 151 F. 3d 694

[7] See *id.*, at 3.

(CA7 1998). In such a case, what will constitute the "single instance of unlawful activity"? Will each mailing be a separate "instance"? The same problem arises with other fraud predicates, including wire fraud (§ 1343), see, *e. g.*, *United States* v. *Zvi*, 168 F. 3d 49 (CA2 1999), and financial institution fraud (§ 1344), see, *e. g.*, *United States* v. *Farr*, 69 F. 3d 545, 1995 WL 638249 (CA9 1995) (unpublished).

The plurality opinion suggests that the application of a profits interpretation will be easy in cases in which the financial transactions are payments of "expenses." *Ante*, at 516–517. But it may be no small matter to determine whether particular payments are for "expenses." When the manager of a gambling operation distributes cash to those who work in the operation, the manager may be paying them the rough equivalent of a salary; that is, the recipients may expect to receive a certain amount for their services whether or not the operation is profitable. On the other hand, those who work in the operation may have the expectation of receiving a certain percentage of the gross revenue (perhaps even in addition to a salary), in which case their distribution may include profits. Such was the case in Santos' lottery, where the runners were paid a percentage of gross revenue. See Indictment 5; 16 Tr. 1399 (Oct. 9, 1997).

The plurality opinion cites 18 U. S. C. § 1963(a) and 21 U. S. C. § 853(a) for the proposition that Congress has "elsewhere" imposed the burden of proving that illegally obtained funds represent profits, but the plurality opinion's examples are inapposite. *Ante*, at 519–520. Neither of these provisions, however, requires a determination of net income. Both provisions permit a fine in the amount of "not more than twice the gross profits or other proceeds." 18 U. S. C. § 1963(a). Thus, the term "proceeds" as used in these provisions is not limited to profits.[8]

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[8] In 18 U. S. C. § 981(a)(2)(B), which is a forfeiture provision of limited scope, Congress defines the term "proceeds" to mean net income. However, that definition applies only "[i]n cases involving lawful goods or law-

For all these reasons, I am convinced that the term "proceeds" in the money laundering statute means gross receipts, not net income. And contrary to the approach taken by JUSTICE STEVENS, I do not see how the meaning of the term "proceeds" can vary depending on the nature of the illegal activity that produced the laundered funds.

II

A

It is apparent that a chief reason for interpreting the term "proceeds" to mean net income in all money laundering cases (the approach taken in the plurality opinion) or in some money laundering cases (the approach taken by JUSTICE STEVENS) is the desire to avoid a "merger" problem in gambling cases—that is, to avoid an interpretation that would mean that every violation of § 1955 (conducting an illegal gambling business) would also constitute a violation of the money laundering statute, which carries a much higher maximum penalty (20 as opposed to 5 years' imprisonment). This concern is misplaced and provides no justification for hobbling a statute that applies to more than 250 predicate offenses and not just running an illegal gambling business.

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ful services that are sold or provided in an illegal manner." Calculating net income in that situation is easier than it would be in most money laundering cases, and it is noteworthy that Congress took care to provide rules and procedures to be used in making the calculation. See *ibid.* If Congress had intended to require proof of net income in money laundering cases, it is likely that Congress likewise would have specified the rules and procedures to be used. It is noteworthy that subparagraph (A) of § 981(a)(2), which the plurality opinion does not mention, provides that in cases that are more analogous to the typical money laundering case, *i. e.*, "cases involving illegal goods [or] illegal services," the term "proceeds" "means [any] property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense."

First, the so-called merger problem is fundamentally a sentencing problem, and the proper remedy is a sentencing remedy. While it is true that the money laundering statute has a higher maximum sentence than the gambling business statute, neither statute has a mandatory minimum. Thus, these statutes do not require a judge to increase a defendant's sentence simply because the defendant was convicted of money laundering as well as running a gambling business. When the respondents were convicted, their money laundering convictions resulted in higher sentences only because of the money laundering Sentencing Guideline, United States Sentencing Commission, Guidelines Manual §2S1.1 (Nov. 1997) (USSG), which, in the pre-*Booker*[9] era, was mandatory. I agree with JUSTICE BREYER, *ante*, at 530–531 (dissenting opinion), that if a defendant is convicted of money laundering for doing no more than is required for a violation of 18 U. S. C. §1955, the defendant's sentence should be no higher than it would have been if the defendant had violated only that latter provision. Insofar as the Guidelines previously required—and now advise in favor of—a stiffer sentence, the obvious remedy is an amendment of the money laundering Guideline. And of course, now that the Guidelines are no longer mandatory, a sentencing judge could impose the sentence called for by the Guideline that applies to the gambling business provision, see USSG §2E3.1(a)(1) (Nov. 2007), or an entirely different sentence.

Second, the merger problem that the plurality opinion and JUSTICE STEVENS seek to avoid assumes the correctness of the interpretation of the promotion prong of the money laundering statute that the Seventh Circuit adopted in Santos' direct appeal, *i. e.*, that a defendant "promotes" an illegal gambling business by doing those things, such as paying employees and winning bettors, that are needed merely to keep

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[9] *United States* v. *Booker*, 543 U. S. 220 (2005).

the business running. As Santos' brief puts it, the merger problem arises when the interpretation of "proceeds" as gross receipts is "[c]ombined with the Government's broad application of the 'promotion' prong of the money laundering statute." Brief for Respondent Santos 6. But the meaning of the element of promotion is not before us in this case, and it would not make sense to allow our interpretation of "proceeds" to be dictated by an unreviewed interpretation of another statutory element.

Third, even if there is a merger problem, it occurs in only a subset of money laundering cases. The money laundering statute reaches financial transactions that are intended to promote more than 250 other crimes, *ante*, at 516 (plurality opinion), as well as transactions that are intended to conceal or disguise the nature, location, source, ownership, or control of illegally obtained funds. See 18 U. S. C. § 1956(a). The meaning of the term "proceeds" cannot vary from one money laundering case to the next, and the plurality opinion and JUSTICE STEVENS inappropriately allow the interpretation of that term to be controlled by a problem that may arise in only a subset of cases.

B

The plurality opinion defends its interpretation by invoking the rule of lenity, but the rule of lenity does not require us to put aside the usual tools of statutory interpretation or to adopt the narrowest possible dictionary definition of the terms in a criminal statute. On the contrary, "[b]ecause the meaning of language is inherently contextual, we have declined to deem a statute 'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government." *Moskal* v. *United States*, 498 U. S. 103, 108 (1990) (citing *McElroy* v. *United States*, 455 U. S. 642, 657–658 (1982)). As I have explained above, the meaning of "proceeds" in the money laundering statute emerges with reasonable clarity when

the term is viewed in context, making the rule of lenity inapplicable.

* * *

For these reasons, I would reverse the decision of the Court of Appeals, and I therefore respectfully dissent.

Syllabus

REGALADO CUELLAR *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06–1456. Argued February 25, 2008—Decided June 2, 2008

Arrested after a search of the car he was driving through Texas toward Mexico revealed nearly $81,000 bundled in plastic bags and covered with animal hair in a secret compartment under the rear floorboard, petitioner was charged with, and convicted of, attempting to transport "funds from a place in the United States to . . . a place outside the United States . . . knowing that the . . . funds . . . represent the proceeds of . . . unlawful activity and . . . that such transportation . . . is designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of" the money, in violation of the federal money laundering statute, 18 U. S. C. § 1956(a)(2)(B)(i). Affirming, the Fifth Circuit rejected as inconsistent with the statutory text petitioner's argument that the Government must prove that he attempted to create the appearance of legitimate wealth, but held that his extensive efforts to prevent the funds' detection during transportation showed that he sought to conceal or disguise their nature, location, source, ownership, or control.

Held: Although § 1956(a)(2)(B)(i) does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence that the funds were concealed during transport. The statutory text makes clear that a conviction requires proof that the transportation's purpose—not merely its effect—was to conceal or disguise one of the listed attributes: the funds' nature, location, source, ownership, or control. Pp. 556–568.

(a) The statute contains no "appearance of legitimate wealth" requirement. Although petitioner is correct that taking steps to make funds appear legitimate is the common meaning of "money laundering," this Court must be guided by a statute's words, not by its title's common meaning, to the extent they are inconsistent, see *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212. Here, Congress used broad language that captures more than classic money laundering: In addition to concealing or disguising the nature or source of illegal funds, Congress also sought to reach transportation designed to conceal or disguise the funds' location, ownership, or control. Nor does the Court find persuasive petitioner's attempt to infuse a money laundering requirement into the listed attributes. Only the attribute "nature" is coextensive

with the funds' illegitimate character, but that does not mean that Congress intended nature to swallow the other attributes. The Court is likewise skeptical of petitioner's argument that violating the statute's elements would necessarily have the effect of making the funds appear more legitimate than they did before. It is not necessarily true that concealing or disguising any one of the listed attributes may have the effect of making the funds appear more legitimate by impeding law enforcement's ability to identify illegitimate funds. Finally, the Court disagrees with petitioner's argument that § 1956(a)(2) must be aimed at something other than merely secretive transportation of illicit funds because that conduct is already punished by the bulk cash smuggling statute, 31 U. S. C. § 5332. Even if § 1956(a)(2)(B)(i) has no "appearance of legitimate wealth" requirement, the two statutes nonetheless target distinct conduct, in that § 5332(a)(1) encompasses, *inter alios*, a defendant who, "with the intent to evade a currency reporting requirement . . . , knowingly conceals more than $10,000 . . . and transports [it] from . . . the United States to a place outside" the country. Pp. 557–561.

(b) The evidence that petitioner concealed the money during transportation is not sufficient to sustain his conviction. In determining whether he knew that "such transportation," § 1956(a)(2)(B)(i), was designed to conceal or disguise the specified attributes of the illegally obtained funds, the critical transportation was not the transportation of the funds within this country on the way to the border, but transportation "from a place in the United States to . . . a place outside the United States," *ibid.*—here, from this country to Mexico. Therefore, what the Government had to prove was that petitioner knew that taking the funds to Mexico was "designed," at least in part, to conceal or disguise their "nature," "location," "source," "ownership," or "control." The Court agrees with petitioner that merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money. This conclusion turns on § 1956(a)(2)(B)(i)'s text, particularly the term "design," which the dictionaries show means purpose or plan; *i. e.*, the transportation's intended aim. Congress wrote "knowing that such transportation is designed . . . to conceal or disguise" a listed attribute, and when an act is "designed to" do something, the most natural reading is that it has that something as its purpose. Because the Fifth Circuit used "design" to refer not to the transportation's purpose but to the manner in which it was carried out, its use of the term in this context was consistent with the alternate meaning of "design" as structure or arrangement. It is implausible, however, that Congress intended this meaning. If it had, it could have expressed its intention simply by writing "knowing that such transportation conceals or disguises," rather than the more com-

Syllabus

plex formulation "knowing that such transportation . . . is designed . . . to conceal or disguise." § 1956(a)(2)(B)(i). It seems far more likely that Congress intended courts to apply the familiar criminal law concepts of purpose and intent than to focus exclusively on how a defendant "structured" the transportation. In addition, the structural meaning of "design" is both overinclusive and underinclusive: It would capture individuals who structured transportation in a secretive way but lacked any criminal intent (such as a person who hid illicit funds *en route* to turn them over to law enforcement); yet it would exclude individuals who fully intended to move the funds in order to impede detection by law enforcement but failed to hide them during transport.

In this case, evidence that petitioner transported the cash bundled in plastic bags and hidden in a secret compartment covered with animal hair was plainly probative of an underlying goal to prevent the funds' detection during the drive into Mexico. However, even with the abundant evidence that petitioner had concealed the money in order to transport it, the Government's own expert testified that the transportation's purpose was to compensate the Mexican leaders of the operation. Thus, the evidence suggested that the transportation's secretive aspects were employed to *facilitate* it, but not necessarily that secrecy was its *purpose*. Because petitioner's extensive efforts to conceal the funds *en route* to Mexico was the only evidence the Government introduced to prove that the transportation was "designed in whole or in part to conceal or disguise the [funds'] nature, . . . location, . . . source, . . . ownership, or . . . control," petitioner's conviction cannot stand. Pp. 561–568.

478 F. 3d 282, reversed.

THOMAS, J., delivered the opinion for a unanimous Court. ALITO, J., filed a concurring opinion, in which ROBERTS, C. J., and KENNEDY, J., joined, *post*, p. 568.

Jerry V. Beard argued the cause for petitioner. With him on the briefs were *Richard Alan Anderson*, *Kevin Joel Page*, *Jonathan D. Hacker*, *Walter Dellinger*, and *Mark S. Davies*.

Lisa H. Schertler argued the cause for the United States. With her on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Joel M. Gershowitz*.*

**Craig D. Singer* and *Jeffrey T. Green* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

JUSTICE THOMAS delivered the opinion of the Court.

This case involves the provision of the federal money laundering statute that prohibits international transportation of the proceeds of unlawful activity. Petitioner argues that his conviction cannot stand because, while the evidence demonstrates that he took steps to hide illicit funds *en route* to Mexico, it does not show that the cross-border transport of those funds was designed to create the appearance of legitimate wealth. Although we agree with the Government that the statute does not require proof that the defendant attempted to "legitimize" tainted funds, we agree with petitioner that the Government must demonstrate that the defendant did more than merely hide the money during its transport. We therefore reverse the judgment of the Fifth Circuit.

I

On July 14, 2004, petitioner Humberto Fidel Regalado Cuellar was stopped in southern Texas for driving erratically. Driving south toward the Mexican border, about 114 miles away, petitioner had just passed the town of Eldorado. In response to the officer's questions, petitioner, who spoke no English, handed the officer a stack of papers. Included were bus tickets showing travel from a Texas border town to San Antonio on July 13 and, in the other direction, from San Antonio to Big Spring, Texas, on July 14. A Spanish-speaking officer, Trooper Danny Nuñez, was called to the scene and began questioning petitioner. Trooper Nuñez soon became suspicious because petitioner was avoiding eye contact and seemed very nervous. Petitioner claimed to be on a 3-day business trip, but he had no luggage or extra clothing with him, and he gave conflicting accounts of his itinerary. When Trooper Nuñez asked petitioner about a bulge in his shirt pocket, petitioner produced a wad of cash that smelled of marijuana.

Petitioner consented to a search of the Volkswagen Beetle that he was driving. While the officers were searching the

vehicle, Trooper Nuñez observed petitioner standing on the side of the road making the sign of the cross, which he interpreted to mean that petitioner knew he was in trouble. A drug detection dog alerted on the cash from petitioner's shirt pocket and on the rear area of the car. Further scrutiny uncovered a secret compartment under the rear floorboard, and inside the compartment the officers found approximately $81,000 in cash. The money was bundled in plastic bags and duct tape, and animal hair was spread in the rear of the vehicle. Petitioner claimed that he had previously transported goats in the vehicle, but Trooper Nuñez doubted that goats could fit in such a small space and suspected that the hair had been spread in an attempt to mask the smell of marijuana.

There were signs that the compartment had been recently created and that someone had attempted to cover up the bodywork: The Beetle's carpeting appeared newer than the rest of the interior, and the exterior of the vehicle appeared to have been purposely splashed with mud to cover up toolmarks, fresh paint, or other work. In the backseat, officers found a fast-food restaurant receipt dated the same day from a city farther north than petitioner claimed to have traveled. After a check of petitioner's last border crossing also proved inconsistent with his story, petitioner was arrested and interrogated. He continued to tell conflicting stories about his travels. At one point, before he knew that the officers had found the cash, he remarked to Trooper Nuñez that he had to have the car in Mexico by midnight or else his family would be "floating down the river." App. 50.

Petitioner was charged with attempting to transport the proceeds of unlawful activity across the border, knowing that the transportation was designed "to conceal or disguise the nature, the location, the source, the ownership, or the control" of the money. 18 U. S. C. § 1956(a)(2)(B)(i). After a 2-day trial, the jury found petitioner guilty. The District Court denied petitioner's motion for judgment of acquittal

based on insufficient evidence and sentenced petitioner to 78 months in prison, followed by three years of supervised release.

On appeal, a divided panel of the Fifth Circuit reversed and rendered a judgment of acquittal. 441 F. 3d 329 (2006). Judge Smith's majority opinion held that, although the evidence showed that petitioner concealed the money for the purpose of transporting it, the statute requires that the purpose of the transportation itself must be to conceal or disguise the unlawful proceeds. *Id.*, at 333–334. Analogizing from cases interpreting another provision of the money laundering statute, the court held that the transportation must be undertaken in an attempt to create the appearance of legitimate wealth.[1] See *id.*, at 334. Although the evidence showed intent to avoid detection while driving the funds to

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[1] Several Courts of Appeals have considered this requirement as relevant, or even necessary, in the context of 18 U. S. C. § 1956(a)(1)(B)(i), which prohibits, *inter alia*, engaging in financial transactions "involv[ing] the proceeds of specified unlawful activity . . . knowing that the transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of some specified unlawful activity." See *United States* v. *Morales-Rodriguez*, 467 F. 3d 1, 13 (CA1 2006); *United States* v. *Esterman*, 324 F. 3d 565, 572–573 (CA7 2003); *United States* v. *Abbell*, 271 F. 3d 1286, 1298 (CA11 2001); *United States* v. *McGahee*, 257 F. 3d 520, 527–528 (CA6 2001); *United States* v. *Dobbs*, 63 F. 3d 391, 397 (CA5 1995); *United States* v. *Dimeck*, 24 F. 3d 1239, 1247 (CA10 1994).

In construing the provision under which petitioner was convicted, four Courts of Appeals, including the Fifth Circuit, have implicitly or explicitly rejected the requirement. See *United States* v. *Garcia-Jaimes*, 484 F. 3d 1311, 1322 (CA11 2007) (upholding convictions for conspiracy to commit transportation money laundering without addressing the requirement); *United States* v. *Ness*, 466 F. 3d 79, 81–82 (CA2 2006) (rejecting the requirement and upholding a conviction for conspiracy to violate the transportation provision where defendant's conduct was elaborate and highly secretive); *United States* v. *Carr*, 25 F. 3d 1194, 1206–1207 (CA3 1994) (upholding a conviction under the transportation provision without discussing the requirement).

Mexico, it did not show that petitioner intended to create the appearance of legitimate wealth, and accordingly no rational trier of fact could have found petitioner guilty. *Ibid.* Judge Davis dissented, arguing that concealment during transportation is sufficient to violate § 1956(a)(2)(B)(i). *Id.*, at 334–336.

The Fifth Circuit granted rehearing en banc and affirmed petitioner's conviction. 478 F. 3d 282 (2007). The court rejected as inconsistent with the statutory text petitioner's argument that the Government must prove that he attempted to create the appearance of legitimate wealth. *Id.*, at 290. But it held that petitioner's extensive efforts to prevent detection of the funds during transportation showed that petitioner sought to conceal or disguise the nature, location, and source, ownership, or control of the funds. *Id.*, at 289–290. Judge Smith dissented for largely the same reasons set forth in his opinion for the original panel majority. He emphasized the distinction between "concealing something to transport it, and transporting something to conceal it," and explained that whether petitioner was doing the latter depended on whether his ultimate plan upon reaching his destination was to conceal the nature, location, source, ownership, or control of the money. *Id.*, at 296–297.

We granted certiorari, 552 U. S. 973 (2007).

II

The federal money laundering statute, 18 U. S. C. § 1956, prohibits specified transfers of money derived from unlawful activities. Subsection (a)(1) makes it unlawful to engage in certain financial transactions, while subsection (a)(2) criminalizes certain kinds of transportation. Petitioner was charged under the transportation provision: The indictment alleged that he attempted to transport illicit proceeds across the Mexican border "knowing that such transportation was designed in whole or in part to conceal and disguise the na-

ture, location, source, ownership, and control" of the funds.[2] App. 10–11 (citing § 1956(a)(2)(B)(i)).

A

We first consider the "designed . . . to conceal" element. Petitioner argues that to satisfy this element, the Government must prove that the defendant attempted to create the appearance of legitimate wealth. Petitioner would replace "designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds" with "designed to create the appearance of legitimate wealth." § 1956(a)(2)(B)(i). This is consistent with the plain meaning of "money laundering," petitioner argues, because that term is commonly understood to mean disguising

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[2] Subsection (a)(2) reads, in its entirety:

"Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

"(A) with the intent to promote the carrying on of specified unlawful activity; or

"(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

"(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

"(ii) to avoid a transaction reporting requirement under State or Federal law,

"shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true."

illegally obtained money in order to make it appear legitimate. In petitioner's view, this common understanding of "money laundering" is implicit in both the transaction and transportation provisions of the statute because concealing or disguising any of the listed attributes would necessarily have the effect of making the funds appear legitimate, and, conversely, revealing any such attribute would necessarily reveal the funds as illicit. The Government disagrees, contending that making funds appear legitimate is merely one way to accomplish money laundering, and that revealing a listed attribute would not necessarily reveal the funds' illicit nature. In any event, the Government argues, the statute should not be cabined to target only classic money laundering because Congress intended to reach any conduct that impairs the ability of law enforcement to find and recover the unlawful proceeds.

We agree with petitioner that taking steps to make funds appear legitimate is the common meaning of the term "money laundering." See American Heritage Dictionary 992 (4th ed. 2000) (hereinafter Am. Hert.) (defining "launder" as "[t]o disguise the source or nature of (illegal funds, for example) by channeling through an intermediate agent"); Black's Law Dictionary 1027 (8th ed. 2004) (hereinafter Black's) (defining "money-laundering" to mean "[t]he act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced"). But to the extent they are inconsistent, we must be guided by the words of the operative statutory provision, and not by the common meaning of the statute's title. See *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) (declining to use a statute's title to limit the meaning of the text). Here, Congress used broad language that captures more than classic money laundering: In addition to concealing or disguising the nature or source of illegal funds, Congress also sought to reach transportation designed to

conceal or disguise the location, ownership, or control of the funds. For example, a defendant who smuggles cash into Mexico with the intent of hiding it from authorities by burying it in the desert may have engaged in transportation designed to conceal the location of those funds, but his conduct would not necessarily have the effect of making the funds appear legitimate.

Nor do we find persuasive petitioner's attempt to infuse a "classic money laundering" requirement into the listed attributes. Contrary to petitioner's argument, revealing those attributes—nature, location, source, ownership, or control—would not necessarily expose the illegitimacy of the funds. Digging up the cash buried in the Mexican desert, for example, would not necessarily reveal that it was derived from unlawful activity. Indeed, of all the listed attributes, only "nature" is coextensive with the funds' illegitimate character: Exposing the nature of illicit funds would, by definition, reveal them as unlawful proceeds. But nature is only one attribute in the statute; that it may be coextensive with the creation of the appearance of legitimate wealth does not mean that Congress intended that requirement to swallow the other listed attributes.

We likewise are skeptical of petitioner's argument that violating the elements of the statute would necessarily have the effect of making the funds appear more legitimate than they did before. It is true that concealing or disguising any one of the listed attributes may have the effect of making the funds appear more legitimate—largely because concealing or disguising those attributes might impede law enforcement's ability to identify illegitimate funds—but we are not convinced that this is necessarily so. It might be possible for a defendant to conceal or disguise a listed attribute without also creating the appearance of legitimate wealth. Cf. *United States* v. *Abbell*, 271 F. 3d 1286, 1298 (CA11 2001) (noting that the transaction provision, although designed to

punish those who "attemp[t] to legitimize their proceeds," may be satisfied without proof that a particular defendant did so). Petitioner's "appearance of legitimate wealth" requirement simply has no basis in the operative provision's text.

Petitioner argues that the money laundering transportation provision must be aimed at something other than merely secretive transportation of illicit funds because that conduct is already punished by the bulk cash smuggling statute, 31 U. S. C. § 5332 (2000 ed., Supp. V). We disagree. A comparison of the statutory language reveals that, even if no "appearance of legitimate wealth" requirement exists in 18 U. S. C. § 1956(a)(2)(B)(i), the two statutes nonetheless target distinct conduct. The bulk cash smuggling provision encompasses, in relevant part, a defendant who,

> "with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than $10,000 in currency or other monetary instruments . . . and transports or transfers or attempts to transport or transfer such currency or monetary instruments from a place within the United States to a place outside of the United States." 31 U. S. C. § 5332(a)(1).

To be sure, certain conduct may fall within both statutes. For example, both provisions may be violated by a defendant who intends to evade a relevant reporting requirement. See *ibid.* (transportation of funds "with the intent to evade a currency reporting requirement"); 18 U. S. C. § 1956(a)(2)(B)(ii) (transportation of funds knowing that it is designed "to avoid a transaction reporting requirement"). But only the money laundering statute may be violated in the absence of such intent. See § 1956(a)(2)(B)(i) (prohibiting transportation of illicit funds knowing that the transportation is designed to conceal or disguise a listed attribute). Similarly, although both statutes encompass transportation of illicit funds, only the bulk cash smuggling statute also pun-

ishes the mere transportation of lawfully derived proceeds.[3] Compare 31 U. S. C. §5332(a) (omitting any requirement that the funds be unlawfully derived) with 18 U. S. C. §1956(a)(2)(B) (requiring that the defendant "kno[w] that the monetary instrument or funds involved in the transportation . . . represent the proceeds of some form of unlawful activity").

B

Having concluded that the statute contains no "appearance of legitimate wealth" requirement, we next consider whether the evidence that petitioner concealed the money during transportation is sufficient to sustain his conviction. As noted, petitioner was convicted under §1956(a)(2)(B)(i), which, in relevant part, makes it a crime to attempt to transport "funds from a place in the United States to . . . a place outside the United States . . . knowing that the . . . funds involved in the transportation . . . represent the proceeds of some form of unlawful activity and knowing that such transportation . . . is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." Accordingly, the Government was required in this case to prove that petitioner (1) attempted to transport funds from the United States to Mexico, (2) knew that these funds "represent[ed] the proceeds of some form of unlawful activity," *e. g.*, drug trafficking, and (3) knew that "such transportation" was designed to "conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds.

It is the last of these that is at issue before us, viz., whether petitioner knew that "such transportation" was designed to conceal or disguise the specified attributes of the

[3] Section 1956(a)(2)(A) also punishes the mere transportation of lawfully derived proceeds, but it imposes the additional requirement, not found in 31 U. S. C. §5332 (2000 ed., Supp. V), that the defendant must have "inten[ded] to promote the carrying on of specified unlawful activity."

illegally obtained funds. In this connection, it is important to keep in mind that the critical transportation was not the transportation of the funds within this country on the way to the border. Instead, the term "such transportation" means transportation "from a place in the United States to . . . a place outside the United States"—here, from the United States to Mexico. Therefore, what the Government had to prove was that petitioner knew that taking the funds to Mexico was "designed," at least in part, to conceal or disguise their "nature," "location," "source," "ownership," or "control."

Petitioner argues that the evidence is not sufficient to sustain his conviction because concealing or disguising a listed attribute of the funds during transportation cannot satisfy the "designed . . . to conceal" element. Citing cases that interpret the identical phrase in the transaction provision to exclude "mere spending,"[4] petitioner argues that the transportation provision must exclude "mere hiding." Otherwise, petitioner contends, all cross-border transport of illicit funds would fall under the statute because people regularly make minimal efforts to conceal money, such as placing it inside a wallet or other receptacle, in order to secure it during travel. The Government responds that concealment during transportation is sufficient to satisfy this element because it is circumstantial evidence that the ultimate purpose of the transportation—*i. e.*, its "design"—is to conceal or disguise a listed attribute of the funds. This standard would not criminalize all cross-border transport of illicit funds, the Government argues, because, just as in the transaction

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[4] See, *e. g.*, *Esterman*, 324 F. 3d, at 570–572; *United States* v. *Corchado-Peralta*, 318 F. 3d 255, 259 (CA1 2003); *McGahee*, 257 F. 3d, at 527; *United States* v. *Herron*, 97 F. 3d 234, 237 (CA8 1996); *United States* v. *Majors*, 196 F. 3d 1206, 1213 (CA11 1999); *United States* v. *Stephenson*, 183 F. 3d 110, 120–121 (CA2 1999); *Dobbs*, 63 F. 3d, at 398; *United States* v. *Garcia-Emanuel*, 14 F. 3d 1469, 1474 (CA10 1994).

cases,[5] the statute encompasses only *substantial* efforts at concealment. As a result, the Government agrees with the Court of Appeals that a violation of the transportation provision cannot be established solely by evidence that the defendant carried money in a wallet or concealed it in some other conventional or incidental way. See 478 F. 3d, at 291 (characterizing the defendant's transportation of money in a box in *United States* v. *Dimeck*, 24 F. 3d 1239, 1246 (CA10 1994), as a "minimal attempt at concealment" that is distinguishable from petitioner's "effort to hide or conceal" the funds).

We agree with petitioner that merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money. Our conclusion turns on the text of § 1956(a)(2)(B)(i), and particularly on the term "design." In this context, "design" means purpose or plan; *i. e.*, the intended aim of the transportation. See Am. Hert. 491 ("[t]o formulate a plan for; devise"; "[t]o create or contrive for a particular purpose or effect"); Black's 478 ("[a] plan or scheme"; "[p]urpose or intention combined with a plan"); see also Brief for United States 14 ("'to conceive and plan out in the mind'" (quoting Webster's Third New International Dictionary 611 (1993))). Congress wrote "knowing that such transportation is designed . . . to conceal or disguise" a listed attribute of the funds, § 1956(a)(2)(B)(i), and when an act is "designed to" do something, the most natural reading is that it has that some-

[5] See, *e. g.*, *Ness*, 466 F. 3d, at 81 (concluding that extensive attempts at secrecy were sufficient to support a conviction under 18 U. S. C. § 1956(a)(1), but "express[ing] no view" as to whether transactions involving "less elaborate stratagems or a lesser measure of secrecy" would be sufficient); *United States* v. *Johnson*, 440 F. 3d 1286, 1291 (CA11 2006) ("Evidence of concealment must be substantial"); *Dimeck*, 24 F. 3d, at 1247 ("The transportation of the money from Detroit to California in a box, suitcase, or other container does not convert the mere transportation of money into money laundering").

thing as its purpose. The Fifth Circuit employed this meaning of design when it referred to the "transportation design or plan to get the funds out of this country." See 478 F. 3d, at 289.

But the Fifth Circuit went on to discuss the "design" of the transportation in a different sense. It described the packaging of the money, its placement in the hidden compartment, and the use of animal hair to mask its scent as "*aspects* of the transportation" that "were designed to conceal or disguise" the nature and location of the cash. *Ibid.* (emphasis added). Because the Fifth Circuit used "design" to refer not to the purpose of the transportation but to the manner in which it was carried out, its use of the term in this context was consistent with the alternate meaning of "design" as structure or arrangement. See Am. Hert. 491, 492 ("[t]o plan out in systematic, usually graphic form"; "[t]he purposeful or inventive arrangement of parts or details"); Black's 478 ("[t]he pattern or configuration of elements in something, such as a work of art"). The Government at times also appears to adopt this meaning of "design." See Brief for United States 21 ("Congress focused on how the transportation itself was 'designed' "); *id.*, at 43 (arguing that petitioner's design to move funds without detection is proof of a design to conceal or disguise the location and nature of the funds).[6] If the statutory term had this meaning, it would

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[6]This understanding of "design" is also implicit in some of the Government's statements that secretive transportation is sufficient to prove a violation of the statute. See Brief for United States 46 (arguing that the statute covers any "surreptitiou[s]" movement of funds "to a location where United States law enforcement authorities are impaired from detecting and intercepting them," apparently regardless of whether such impairment was the purpose of the plan); *id.*, at 11 ("When a defendant surreptitiously transports or attempts to transport illegal proceeds across the border knowing of their illegal character, money laundering is the appropriate charge"); *id.*, at 13 ("The statute explicitly covers, and was intended to cover, a wide range of conduct that impairs the ability of law enforcement to find and recover the proceeds of crime"); Tr. of Oral

apply whenever a person transported illicit funds in a secretive manner. Judge Smith supplied an example of this construction: A petty thief who hides money in his shoe and then walks across the border to spend the money in local bars, see 478 F. 3d, at 301 (dissenting opinion), has engaged in transportation designed to conceal the location of the money because he has hidden it in an unlikely place.

We think it implausible, however, that Congress intended this meaning of "design." If it had, it could have expressed its intention simply by writing "knowing that such transportation conceals or disguises," rather than the more complex formulation "knowing that such transportation . . . is designed . . . to conceal or disguise." § 1956(a)(2)(B)(i). It seems far more likely that Congress intended courts to apply the familiar criminal law concepts of purpose and intent than to focus exclusively on how a defendant "structured" the transportation. In addition, the structural meaning of "design" is both overinclusive and underinclusive: It would capture individuals who structured transportation in a secretive way but lacked any criminal intent (such as a person who hid illicit funds *en route* to turn them over to law enforcement); yet it would exclude individuals who fully intended to move the funds in order to impede detection by law enforcement but failed to hide them during the transportation.

To be sure, purpose and structure are often related. One may employ structure to achieve a purpose: For example, the petty thief may hide money in his shoe to prevent it from being detected as he crosses the border with the intent to hide the money in Mexico. See 478 F. 3d, at 301 (Smith, J., dissenting). Although transporting money in a conventional manner may suggest no particular purpose other than simply

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Arg. 46. Agent Richard Nuckles, Immigration and Customs Enforcement (ICE), appears to have adopted this standard at trial as well. See Tr. 196 (Oct. 12, 2004) (testifying that attempting to move funds across the border without detection would be illegal, apparently regardless of the reason for doing so).

to move it from one place to another, secretively transporting it suggests, at least, that the defendant did not want the money to be detected during transport. In this case, evidence of the methods petitioner used to transport the nearly $81,000 in cash—bundled in plastic bags and hidden in a secret compartment covered with animal hair—was plainly probative of an underlying goal to prevent the funds from being detected while he drove them from the United States to Mexico. The same secretive aspects of the transportation also may be circumstantial evidence that the transportation itself was intended to avoid detection of the funds, because, for example, they may suggest that the transportation is only one step in a larger plan to facilitate the cross-border transport of the funds. Cf. *id.*, at 289 (noting that "concealment of the funds during the U. S. leg of the trip [was] a vital part of the transportation design or plan to get the funds out of this country"). But its probative force, in that context, is weak. "There is a difference between concealing something to transport it, and transporting something to conceal it," *id.*, at 296–297 (Smith, J., dissenting); that is, *how* one moves the money is distinct from *why* one moves the money. Evidence of the former, standing alone, is not sufficient to prove the latter.

This case illustrates why: Even with abundant evidence that petitioner had concealed the money in order to transport it, the Government's own expert witness—ICE Agent Richard Nuckles—testified that the purpose of the transportation was to compensate the leaders of the operation.[7] Tr. 179 (Oct. 12, 2004), App. 64–65 ("[T]he bulk of [the money] generally goes back to Mexico, because the smuggler is the one who originated this entire process. He's going to get a

[7] Concealing or disguising a listed attribute need be only one of the purposes of the transportation. See § 1956(a)(2)(B)(i) (providing that a transportation plan need be designed "in whole or in part" to conceal or disguise). But here, compensating the leaders of the operation was the only purpose to which Agent Nuckles testified.

large cut of the profit, and that money has to be moved back to him in Mexico"). The evidence suggested that the secretive aspects of the transportation were employed to *facilitate* the transportation, see 478 F. 3d, at 289 (noting that "concealment of the funds during the U. S. leg of the trip [was] a vital part of the transportation design or plan"), but not necessarily that secrecy was the *purpose* of the transportation. Agent Nuckles testified that the secretive manner of transportation was consistent with drug smuggling, see Tr. 179–180, App. 65–66, but the Government failed to introduce any evidence that the reason drug smugglers move money to Mexico is to conceal or disguise a listed attribute of the funds.

Agent Nuckles also testified that Acuna, the Mexican border town to which petitioner was headed, has a cash economy and that U. S. currency is widely accepted there. See Tr. 188–189, App. 69. The Fifth Circuit apparently viewed this as evidence that petitioner transported the money in order to conceal or disguise it: "[G]iven Mexico's largely cash economy, if [petitioner] had successfully transported the funds to Mexico without detection, the jury was entitled to find that the funds would have been better concealed or concealable after the transportation than before." 478 F. 3d, at 292. The statutory text makes clear, however, that a conviction under this provision requires proof that the purpose—not merely effect—of the transportation was to conceal or disguise a listed attribute. Although the evidence suggested that petitioner's transportation would have had the effect of concealing the funds, the evidence did not demonstrate that such concealment was the purpose of the transportation because, for instance, there was no evidence that petitioner knew about or intended the effect.[5]

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[5] In many cases, a criminal defendant's knowledge or purpose is not established by direct evidence but instead is shown circumstantially based on inferences drawn from evidence of effect. See, *e. g.*, 1 W. LaFave, Substantive Criminal Law § 5.2(a), p. 341 (2d ed. 2003). Specifically, where

In sum, we conclude that the evidence introduced by the Government was not sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that petitioner's transportation was "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." § 1956(a)(2)(B)(i).

III

The provision of the money laundering statute under which petitioner was convicted requires proof that the transportation was "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds. § 1956(a)(2)(B)(i). Although this element does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence that a defendant concealed the funds during their transport. In this case, the only evidence introduced to prove this element showed that petitioner engaged in extensive efforts to conceal the funds *en route* to Mexico, and thus his conviction cannot stand. We reverse the judgment of the Fifth Circuit.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, concurring.

I join the opinion of the Court but write briefly to summarize my understanding of the deficiency in the Government's proof.

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the consequences of an action are commonly known, a trier of fact will often infer that the person taking the action knew what the consequences would be and acted with the purpose of bringing them about. Although, as noted above, the Government introduced some evidence regarding the effect of transporting illegally obtained money to Mexico, the Government has not pointed to any evidence in the record from which it could be inferred beyond a reasonable doubt that petitioner knew that taking the funds to Mexico would have had one of the relevant effects.

As the Court notes, *ante*, at 561–562, the Government was required in this case to prove that petitioner knew that the plan to transport the funds across the Mexican border was designed at least in part to "conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds. 18 U. S. C. § 1956(a)(2)(B)(i).

Transporting the funds across the border would have had the *effect* of achieving this objective if, once the funds made it into Mexico, it would have been harder for law enforcement authorities in this country (1) to ascertain that the funds were drug proceeds ("nature"), (2) to find the funds ("location"), (3) to determine where they came from ("source"), (4) to ascertain who owned them ("ownership"), or (5) to find out who controlled them ("control"). But as the Court notes, *ante*, at 566, the prosecution had to prove, not simply that the transportation of the funds from the United States to Mexico would have had one of these *effects*, *ibid.*, but that petitioner *knew* that achieving one of these effects was a *design* (*i. e.*, purpose) of the transportation.

As the Court also notes, *ante*, at 567–568, n. 8, a criminal defendant's intent is often inferred. Here, proof of petitioner's knowledge and of the intent of the person or persons who "designed" the transportation would have been sufficient if the prosecution had introduced evidence showing, not only that taking "dirty" money across the border has one or more of the effects noted above, but that it is commonly known in the relevant circles (that is, among those who design and carry out "such transportation," § 1956(a)(2)(B)) that taking "dirty" money to Mexico has one of the effects noted above. Such evidence would permit a trier of fact to infer (1) that the person or persons who "designed" the plan to have the funds taken to Mexico intended to achieve the effect in question and (2) that a person like petitioner (that is, a person who is recruited to transport the funds) knew that this was the design.

Of course, if the prosecution had introduced such evidence, the defense could have countered with any available proof showing (1) that in fact the achievement of these effects was not a design of the transportation or (2) that petitioner in fact did not know that achieving one of these effects was a purpose of the plan. It would have then been up to the trier of fact to decide whether the statutory elements had been adequately proved.

At petitioner's trial, as the Court notes, *ante*, at 567, the Government introduced some evidence regarding the effect of transporting illegally obtained money to Mexico, but the Government has not pointed to any evidence in the record from which it could be inferred beyond a reasonable doubt that a person like petitioner knew that taking the funds to Mexico would have had one of the relevant effects. For this reason, I agree with the Court that petitioner's conviction cannot be sustained.

Syllabus

RICHLIN SECURITY SERVICE CO. *v.* CHERTOFF, SECRETARY OF HOMELAND SECURITY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 06–1717. Argued March 19, 2008—Decided June 2, 2008

After prevailing against the Government on a claim originating in the Department of Transportation's Board of Contract Appeals, petitioner (Richlin) filed an application with the Board for reimbursement of attorney's fees, expenses, and costs, pursuant to the Equal Access to Justice Act (EAJA). The Board concluded, *inter alia*, that Richlin was not entitled to recover paralegal fees at the rates at which it was billed by its law firm, holding that EAJA limited such recovery to the attorney's cost, which was lower than the billed rate. In affirming, the Federal Circuit concluded that the term "fees," for which EAJA authorizes recovery at "prevailing market rates," embraces only the fees of attorneys, experts, and agents.

Held: A prevailing party that satisfies EAJA's other requirements may recover its paralegal fees from the Government at prevailing market rates. Pp. 576–590.

(a) EAJA permits a prevailing party to recover "fees and other expenses incurred by that party in connection with" administrative proceedings, 5 U. S. C. §504(a)(1), including "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project . . . , and reasonable attorney or agent fees," and bases the amount of such fees on "prevailing market rates," §504(b)(1)(A). Because Richlin "incurred" "fees" for paralegal services in connection with its action before the Board, a straightforward reading of the statute demonstrates that Richlin was entitled to recover fees for the paralegal services it purchased at the market rate for such services. The Government's contrary reading—that expenditures for paralegal services are "other expenses" recoverable only at "reasonable cost"—is unpersuasive. Section 504(b)(1)(A) does not clearly distinguish between the rates at which "fees" and "other expenses" are reimbursed. Even if the statutory text supported the Government's dichotomy, it would hardly follow that amounts billed for paralegal services should be classified as "expenses" rather than as "fees." Paralegals are surely more analogous to attorneys, experts, and agents than to studies, analyses, reports, tests, and projects. Even if the Court agreed that EAJA

Syllabus

limited paralegal fees to "reasonable cost," it would not follow that the cost should be measured from the perspective of the party's attorney rather than the client. By providing that an agency shall award a prevailing party "fees and other expenses . . . *incurred by that party*" (emphasis added), § 504(a)(1) leaves no doubt that Congress intended the "reasonable cost" of § 504(b)(1)(A)'s items to be calculated from the litigant's perspective. It is unlikely that Congress, without even mentioning paralegals, intended to make an exception of them by calculating their cost from their employer's perspective. It seems more plausible that Congress intended all "fees and other expenses" to be recoverable at the litigant's "reasonable cost," subject to the proviso that "reasonable cost" would be deemed to be "prevailing market rates" when such rates could be determined. Pp. 576–580.

(b) To the extent that some ambiguity subsists in the statutory text, this Court need look no further to resolve it than *Missouri* v. *Jenkins*, 491 U. S. 274, where the Court addressed a similar question with respect to the Civil Rights Attorney's Fees Awards Act of 1976—which provides that a court "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs," 42 U. S. C. § 1988—finding it "self-evident" that "attorney's fee" embraced the fees of paralegals as well as attorneys, 491 U. S., at 285. EAJA, like § 1988, entitles certain parties to recover "reasonable attorney . . . fees," § 504(b)(1)(A), and makes no mention of the paralegals, "secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client," 491 U. S., at 285. Thus, EAJA, like § 1988, must be interpreted as using the term "attorney . . . fees" to reach fees for paralegal services as well as compensation for the attorney's personal labor, making "self-evident" that Congress intended that term to embrace paralegal fees. Since § 504 generally provides for recovery of attorney's fees at "prevailing market rates," it follows that paralegal fees must also be recoverable at those rates. The Government's contention that *Jenkins* found paralegal fees recoverable as "attorney's fee[s]" because § 1988 authorized no other recoverable "expenses" finds no support in *Jenkins* itself, which turned not on extratextual policy goals, but on the "self-evident" proposition that "attorney's fee[s]" had historically included paralegal fees. Indeed, this Court rejected the Government's interpretation of *Jenkins* in *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, concluding that a petitioner seeking expert witness fees under § 1988 could not rely on *Jenkins* for the proposition that § 1988's "broad remedial purposes" allowed recovery of fees not expressly authorized by statute. Pp. 580–583.

(c) Even assuming that some residual ambiguity in the statutory text justified resorting to extratextual authorities, the legislative history

cited by the Government does not address the question presented and policy considerations actually counsel in favor of Richlin's interpretation. Pp. 583–590.

472 F. 3d 1370, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, in which SCALIA, J., joined except as to Part III–A, and in which THOMAS, J., joined except as to Parts II–B and III.

Brian Wolfman argued the cause for petitioner. With him on the briefs was *Scott L. Nelson*.

Anthony A. Yang argued the cause for respondent. With him on the brief were *Solicitor General Clement*, *Acting Assistant Attorney General Bucholtz*, *Deputy Solicitor General Garre*, *Michael Jay Singer*, and *Michael E. Robinson*.*

JUSTICE ALITO delivered the opinion of the Court.†

The question presented in this case is whether the Equal Access to Justice Act (EAJA), 5 U. S. C. §504(a)(1) (2006 ed.) and 28 U. S. C. §2412(d)(1)(A) (2000 ed.), allows a prevailing party in a case brought by or against the Government to recover fees for paralegal services at the market rate for such services or only at their cost to the party's attorney. The United States Court of Appeals for the Federal Circuit limited recovery to the attorney's cost. 472 F. 3d 1370 (2006). We reverse.

I

Petitioner Richlin Security Service Co. (Richlin) is a small California proprietorship. In the early 1990's, it was engaged by the former Immigration and Naturalization Service

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**Amy Howe*, *Kevin K. Russell*, *Thomas C. Goldstein*, *Pamela S. Karlan*, and *Jeffrey L. Fisher* filed a brief for the National Association of Legal Assistants et al. as *amici curiae* urging reversal.

†JUSTICE SCALIA joins this opinion except as to Part III–A, and JUSTICE THOMAS joins this opinion except as to Parts II–B and III.

to provide guard services for detainees at Los Angeles International Airport. Through mutual mistake, the parties' two contracts misclassified Richlin's employees under the Service Contract Act of 1965, 41 U. S. C. § 351 *et seq.* The Department of Labor discovered the misclassification and ordered Richlin to pay its employees back wages. Richlin responded by filing a claim against the Government with the Department of Transportation's Board of Contract Appeals (Board). The claim sought reformation of the two contracts in order to force the Government to make additional payments necessary to cover Richlin's liability under the Service Contract Act. Richlin prevailed after extensive litigation, and the Board entered an award in its favor.

Richlin then filed an application with the Board for reimbursement of its attorney's fees, expenses, and costs pursuant to EAJA. Under EAJA, "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U. S. C. § 504(a)(1). In addition to its other fees and expenses, Richlin sought $45,141.10 for 523.8 hours of paralegal work on its contract claim and $6,760 for 68.2 hours of paralegal work on the EAJA application itself.

The Board granted Richlin's application in part. *Richlin Security Service Co.* v. *Department of Justice*, Docket Nos. 3034E, 3035E, Contract Nos. WRO–06–90, WRO–03–91, 2005 WL 1635099 (June 30, 2005), App. to Pet. for Cert. 25a. It found that Richlin met § 504(b)(1)(B)'s eligibility requirements, see *id.*, at 30a, and that the Government's position had not been "substantially justified" within the meaning of § 504(a)(1), *id.*, at 32a. It concluded, however, that Richlin was not entitled to recover its paralegal fees at the rates (ranging from $50 per hour to $95 per hour) at which Richlin

was billed by its law firm.[1] See *id.*, at 39a. The Board held that EAJA limited recovery of paralegal fees to "the cost to the firm rather than . . . the billed rate." *Ibid.* Richlin had not submitted any evidence regarding the cost of the paralegal services to its law firm, see *ibid.*, but the Board found that "$35 per hour is a reasonable cost to the firm[,] having taken judicial notice of paralegal salaries in the Washington D. C. area as reflected on the internet," *id.*, at 42a–43a.

A divided panel of the Federal Circuit affirmed. 472 F. 3d 1370. The court construed the term "fees," for which EAJA authorizes recovery at "prevailing market rates," § 504(b)(1)(A), as embracing only the fees of attorneys, experts, and agents.[2] See *id.*, at 1374. The court declined to follow the contrary decision of the Eleventh Circuit in *Jean* v. *Nelson*, 863 F. 2d 759 (1988), aff'd *sub nom. Commissioner* v. *Jean*, 496 U. S. 154 (1990). It also distinguished this Court's decisions in *Missouri* v. *Jenkins*, 491 U. S. 274 (1989), and *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83 (1991), reasoning that those cases involved a different fee-shifting statute with different "'goals and objectives.'" 472 F. 3d, at 1375–1377, 1379 (discussing the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988). The court instead found support for its interpretation in EAJA's legislative history, see 472 F. 3d, at 1381 (citing S. Rep. No. 98–586 (1984) (hereinafter S. Rep.)), and in considerations of public policy, see 472 F. 3d, at 1380–1381.

Judge Plager dissented. He believed that the authorities distinguished by the majority (particularly this Court's deci-

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[1] Richlin was actually billed for paralegal services at rates as high as $135 per hour, but it amended its application to cap the fees at $95 per hour. See App. to Pet. for Cert. 39a; Brief for Petitioner 9; Brief for Respondent 4, n. 2.

[2] Some agencies allow nonattorney representatives, known as "agents," to assist parties with the presentation of their cases. See n. 10, *infra*. Richlin has never claimed that a paralegal may qualify as an "agent" within the meaning of § 504(b)(1)(A).

sions in *Jenkins* and *Casey*) were indistinguishable. He also identified "sound policy reasons for . . . adopting the Supreme Court's take of the case, even if we thought we had a choice." 472 F. 3d, at 1383.

Richlin petitioned for rehearing, pointing out that the approach taken by the Eleventh Circuit in *Jean* had been followed by several other Circuits. See 482 F. 3d 1358, 1359 (CA Fed. 2007) (citing *Role Models Am., Inc.* v. *Brownlee*, 353 F. 3d 962, 974 (CADC 2004); *Hyatt* v. *Barnhart*, 315 F. 3d 239, 255 (CA4 2002); and *Miller* v. *Alamo*, 983 F. 2d 856, 862 (CA8 1993)). The panel denied rehearing over Judge Plager's dissent, and the full court denied rehearing en banc. See App. to Pet. for Cert. 57a.

We granted certiorari. 552 U. S. 1021 (2007).

II

A

EAJA permits an eligible prevailing party to recover "fees and other expenses incurred by that party in connection with" a proceeding before an administrative agency. 5 U. S. C. § 504(a)(1). EAJA defines "fees and other expenses" as follows:

> "'[F]ees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as

> the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)" § 504(b)(1)(A).[3]

In this case, Richlin "incurred" "fees" for paralegal services in connection with its contract action before the Board. Since § 504(b)(1)(A) awards fees at "prevailing market rates," a straightforward reading of the statute leads to the conclusion that Richlin was entitled to recover fees for the paralegal services it purchased at the market rate for such services.

The Government resists this reading by distinguishing "fees" from "other expenses." The Government concedes that "fees" are reimbursable at "prevailing market rates," but it insists that "other expenses" (including expenses for "any study, analysis, engineering report, test, or project") are reimbursable only at their "reasonable cost." And in the Government's view, outlays for paralegal services are better characterized as "other expenses" than as "fees." The Government observes that the second sentence of § 504(b)(1)(A), which explains how to calculate awards for "fees," refers to attorneys, agents, and expert witnesses, without mentioning paralegals. From this omission, the Government infers that Congress intended to treat expenditures for paralegal services not as "fees" but as "other expenses," recoverable at "reasonable cost."

We find the Government's fractured interpretation of the statute unpersuasive. Contrary to the Government's contention, § 504(b)(1)(A) does not clearly distinguish between

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[3] Virtually identical fee-shifting provisions apply to actions by or against the Government in federal court. See 28 U. S. C. §§ 2412(a)(1), (d)(2)(A). The question presented addresses both §§ 504 and 2412, but the Federal Circuit's decision resolved only petitioner's § 504 application, and the Government avers (without challenge from Richlin) that § 2412 "is not at issue in this case." Brief for Respondent 2, n. 1. We assume without deciding that the reasoning of our opinion would extend equally to §§ 504 and 2412. We confine our discussion to § 504.

the rates at which "fees" and "other expenses" are reimbursed. Although the statute does refer to the "reasonable cost" of "any study, analysis, engineering report, test, or project," Congress may reasonably have believed that market rates would not exist for work product of that kind. At one point, Congress even appears to use the terms "expenses" and "fees" interchangeably: The first clause of §504(b)(1)(A) refers to the "reasonable expenses of expert witnesses," while the parenthetical characterizes expert compensation as "fees." There is no indication that Congress, in using the term "expenses" in one place and "fees" in the other, was referring to two different components of expert remuneration.

Even if the dichotomy that the Government draws between "fees" and "other expenses" were supported by the statutory text, it would hardly follow that amounts billed for paralegal services should be classified as "expenses" rather than as "fees." The Government concludes that the omission of paralegal fees from §504(b)(1)(A)'s parenthetical (which generally authorizes reimbursement at "prevailing market rates") implies that the recovery of paralegal fees is limited to cost. But one could just as easily conclude that the omission of paralegal fees from the litany of "any study, analysis, engineering report, test, or project" (all of which are recoverable at "reasonable cost") implies that paralegal fees are recoverable at market rates. Surely paralegals are more analogous to attorneys, experts, and agents than to studies, analyses, reports, tests, and projects. Even the Government's brief, which incants the term "paralegal expenses," *e. g.*, Brief for Respondent 4, 5, 6, 7, 8, 9, 10, 11, 12, slips up once and refers to them as "fees," see *id.*, at 35 ("As the court of appeals explained, treating paralegal fees as attorney fees could 'distort the normal allocation of work and result in a less efficient performance of legal services' under the EAJA . . . ").

But even if we agreed that EAJA limited a prevailing party's recovery for paralegal fees to "reasonable cost," it certainly would not follow that the cost should be measured from the perspective of the party's attorney.[4] To the contrary, it would be anomalous to measure cost from the perspective of the attorney rather than the client. We do not understand the Government to contend, for example, that the "reasonable cost" of an "engineering report" or "analysis" should be calculated from the perspective of the firm that employs the engineer or analyst. Such an interpretation would be tough to square with the statutory language, which provides that an agency shall award to a prevailing party "fees and other expenses *incurred by that party*." 5 U. S. C. §504(a)(1) (emphasis added); see also §504(b)(1)(A). That language leaves no doubt that Congress intended the "reasonable cost" of the specified items in §504(b)(1)(A) to be calculated from the perspective of the litigant. That being the case, we find it hard to believe that Congress, without even mentioning paralegals, intended to make an exception of them by calculating their cost from the perspective of their employer rather than the litigant. It seems more plausible that Congress intended all "fees and other expenses" to be recoverable at the litigant's "reasonable cost," subject to the proviso that "reasonable cost" would be

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[4]The Government contends that the question presented does not fairly include the question whether the cost of paralegal services should be calculated from the perspective of the litigant rather than the litigant's attorney. We disagree. The question presented in Richlin's petition for certiorari was whether "a prevailing party [may] be awarded attorney fees for paralegal services at the market rate for such services, . . . [or at] cost only." Pet. for Cert. i. A decision limiting reimbursement to "cost only" would simply beg the question of how that cost should be measured. Since the question presented cannot genuinely be answered without addressing the subsidiary question, we have no difficulty concluding that the latter question is "fairly included" within the former. See this Court's Rule 14.1(a).

deemed to be "prevailing market rates" when such rates could be determined.[5]

B

To the extent that some ambiguity subsists in the statutory text, we need not look far to resolve it, for we have already addressed a similar question with respect to another fee-shifting statute. In *Missouri* v. *Jenkins*, 491 U. S. 274 (1989), we considered whether litigants could recover paralegal fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. Section 1988 provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." We concluded that the term "attorney's fee" in § 1988 "cannot have been meant to compensate only work performed personally by members of the bar." 491 U. S., at 285. Although separate billing for paralegals had become "increasingly widespread," *id.*, at 286 (internal quotation marks omitted), attorney's fees had traditionally subsumed both the attorney's personal labor and the labor of paralegals and other individuals who contributed to the attorney's work product, see *id.*, at 285. We were so confident that Congress had given the term "attorney's fees" this traditional gloss that we declared it "self-evident" that the term embraced the fees of paralegals as well as attorneys. *Ibid.*

[5] It is worth recalling that the Board calculated Richlin's award based on an Internet survey of paralegal salaries in the District of Columbia. Presumably the salaries the Board identified represented the market rate for paralegal compensation. The limited award that the Government wants affirmed was thus based, ironically enough, on the "prevailing market rates" for paralegal services. The fact that paralegal salaries respond to market forces no less than the fees that clients pay suggests to us that this case has more to do with determining whose expenditures get reimbursed (the attorney's or the client's) than with determining how expenditures are calculated (at cost or at market). Since EAJA authorizes the recovery of fees and other expenses "incurred by [the] party," § 504(a)(1), rather than the party's attorney, the answer to the former question is plain.

We think *Jenkins* substantially answers the question before us. EAJA, like § 1988, entitles certain parties to recover "reasonable attorney . . . fees." 5 U. S. C. § 504(b)(1)(A). EAJA, like § 1988, makes no mention of the paralegals, "secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client." *Jenkins*, *supra*, at 285. And we think EAJA, like § 1988, must be interpreted as using the term "attorney . . . fees" to reach fees for paralegal services as well as compensation for the attorney's personal labor. The Government does not contend that the meaning of the term "attorney's fees" changed so much between § 1988's enactment in 1976 and EAJA's enactment in 1980 that the term's meaning in one statute must be different from its meaning in the other. Under the reasoning of *Jenkins*, we take it as "self-evident" that when Congress instructed agencies to award "attorney . . . fees" to certain parties prevailing against the Government, that term was intended to embrace paralegal fees as well. Since § 504 generally provides for recovery of attorney's fees at "prevailing market rates," it follows that fees for paralegal services must be recoverable at prevailing market rates as well.

The Government contends that our decision in *Jenkins* was driven by considerations arising from the different context in which the term "attorney's fee" was used in § 1988. At the time *Jenkins* was decided, § 1988 provided for the recovery of attorney's fees without reference to any other recoverable "expenses." The Government insists that *Jenkins* found paralegal fees recoverable under the guise of "attorney's fee[s]" because otherwise paralegal fees would not be recoverable at all. Since EAJA expressly permits recovery (albeit at "cost") for items other than attorney, agent, and expert witness fees, the Government sees no reason to give EAJA the broad construction that *Jenkins* gave § 1988.

The Government's rationale for distinguishing *Jenkins* finds no support either in our opinion there or in our subse-

quent decisions. Our opinion in *Jenkins* expressed no apprehension at the possibility that a contrary decision would leave the claimant emptyhanded. This omission is unsurprising, since our decision in *Jenkins* did not rest on the conviction that recovery at market rates was better than nothing. Our decision rested instead on the proposition—a proposition we took as "self-evident"—that the term "attorney's fee" had historically included fees for paralegal services.

Indeed, the Government's interpretation of *Jenkins* was rejected by this Court just two years after *Jenkins* was handed down. In *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, the petitioner sought to recover expert witness fees from the Commonwealth of Pennsylvania pursuant to § 1988. The petitioner looked to *Jenkins* for the proposition that the "broad remedial purposes" of § 1988 allowed the recovery of fees not expressly authorized by statute. The Court rejected that interpretation of *Jenkins:*

> "The issue [in *Jenkins*] was not, as [petitioner] contends, whether we would permit our perception of the 'policy' of the statute to overcome its 'plain language.' It was not remotely plain in *Jenkins* that the phrase 'attorney's fee' did not include charges for law clerk and paralegal services. Such services, like the services of 'secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product,' had traditionally been included in calculation of the lawyers' hourly rates. Only recently had there arisen 'the increasingly widespread custom of separately billing for [such] services.' By contrast, there has never been, to our knowledge, a practice of including the cost of expert services within attorneys' hourly rates. There was also no record in *Jenkins*—as there is a lengthy record here—of statutory usage that recognizes a distinction between the charges at issue and attorney's fees." *Casey, supra*, at 99 (quot-

ing 491 U. S., at 285–286; some internal quotation marks and citations omitted).[6]

Our analysis of *Jenkins* in *Casey* refutes the Government's claim that *Jenkins* had to stretch the law to fit hard facts. As *Casey* shows, our decision in *Jenkins* turned not on extra-textual policy goals but on the traditional meaning of the term "attorney's fees."

III

The Government parries this textual and doctrinal analysis with legislative history and public policy. We are not persuaded by either. The legislative history cited by the Government does not address the question presented, and policy considerations actually counsel in favor of Richlin's interpretation.

A

The Government contends first that a 1984 Senate Report accompanying the bill that reenacted EAJA[7] unequivocally expressed congressional intent that paralegal fees should be recovered only "'*at cost*.'" Brief for Respondent 29 (quoting S. Rep., at 15; emphasis in original). It next contends that the Report tacitly endorsed the same result by approving model rules of the Administrative Conference of the United States and a pre-EAJA Sixth Circuit decision, both of which had adopted schemes of reimbursement at attorney cost. See Brief for Respondent 29. We are not persuaded. In our view, the legislative history does not even address the

[6] Following our decision in *Casey*, Congress amended § 1988 to allow parties to recover "expert fees as part of the attorney's fees." Civil Rights Act of 1991, § 113(a), 105 Stat. 1079 (codified at 42 U. S. C. § 1988(c)).

[7] The version of EAJA first enacted in 1980 had a sunset provision effective October 1, 1984. See §§ 203(c), 204(c), 94 Stat. 2327, 2329. Congress revived EAJA without the sunset provision (but with certain other amendments) in 1985. See Act of Aug. 5, 1985, §§ 1–2, 6, 99 Stat. 183–186; see also n. 8, *infra*; see generally *Scarborough* v. *Principi*, 541 U. S. 401, 406–407 (2004) (summarizing EAJA's legislative history).

question presented, much less answer it in the Government's favor.[8]

The Senate Report accompanying the 1984 bill remarked that "[e]xamples of the type of expenses that should ordinarily be compensable [under EAJA] include paralegal time (billed at cost)." S. Rep., at 15. The Government concludes from this stray remark that Congress intended to limit recovery of paralegal fees to attorney cost. But as we observed earlier, the word "cost" could just as easily (and more sensibly) refer to the client's cost rather than the attorney's cost. Under the former interpretation, the Senate Report simply indicates that a prevailing party who satisfies EAJA's other requirements should generally be able to "bil[l]" the Government for any reasonable amount the party paid for paralegal services. Since the litigant's out-of-pocket cost for paralegal services would normally be equal to the "prevailing market rat[e]" for such services, 5 U. S. C. § 504(b)(1)(A), the Senate Report could easily support Richlin's interpretation.

Moreover, even if the Government's interpretation of the word "cost" is correct, that interpretation would not be inconsistent with our decision today. "Nothing in [EAJA] requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do

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[8] Richlin makes a threshold challenge to the legitimacy of the 1984 Senate Report as legislative history, observing that the bill it accompanied was vetoed by the President before being enacted by a subsequent Congress. See Brief for Petitioner 27 ("To the extent that legislative history serves as legitimate evidence of congressional intent, it does so only because it is presumed to have been ratified by Congress and the President when the relevant legislation was enacted" (citing Siegel, The Use of Legislative History in a System of Separated Powers, 53 Vand. L. Rev. 1457, 1522 (2000); and *Sullivan* v. *Finkelstein*, 496 U. S. 617, 631–632 (1990) (Scalia, J., concurring in part))). But see *Melkonyan* v. *Sullivan*, 501 U. S. 89, 96 (1991) (relying on the same Report to interpret EAJA's 1985 amendments). Because the legislative history is a wash in this case, we need not decide precisely how much weight it deserves in our analysis.

so, or to bill the work of paralegals only at cost, that is all that [EAJA] requires." *Jenkins*, 491 U. S., at 288 (construing 42 U. S. C. § 1988). We thus recognize the possibility, as we did in *Jenkins*, that the attorney's cost for paralegal services will supply the relevant metric for calculating the client's recovery. Whether that metric is appropriate depends on market practice. The Senate Report, even under the Government's contestable interpretation, is not inconsistent with that conclusion. On the contrary, the Report implies that courts should look to market practice in setting EAJA awards. See S. Rep., at 15 ("The Act should not be read . . . to permit reimbursement for items *ordinarily* included in office overhead, nor for any other expenses not reasonable in amount, necessary for the conduct of the litigation, *and customarily chargeable to clients*" (emphasis added)). Beyond that vague guidance, the Report does not address the critical question in this case: whether EAJA limits recovery of paralegal fees to attorney cost *regardless of market practice*. As such, the Report does not persuade us of the soundness of the Government's interpretation of the statute.

The Government's reliance on the Sixth Circuit's decision in *Northcross* v. *Board of Ed. of Memphis City Schools*, 611 F. 2d 624 (1979), founders for the same reason. The Government contends that *Northcross* approved of reimbursement at attorney cost under 42 U. S. C. § 1988 and that the 1984 Senate Report, by endorsing *Northcross*, tacitly approved of the same result for EAJA. See Brief for Respondent 30 (citing *Northcross*, *supra*, at 639). The problem again is that *Northcross* did not decide whether a litigant's recovery for paralegal services would be limited to his attorney's cost even in a market where litigants were customarily billed at "prevailing market rates." Although the Sixth Circuit seems to have been aware that paralegal services could be billed to clients at market rates, some language in its opinion suggests that the court assumed that attorneys billed their

clients only for the out-of-pocket cost of paralegal services.[9] Since *Northcross* does not clearly address the question presented, its endorsement in the Senate Report means little.

Finally, the model rules cited in the Senate Report may actually support Richlin's position. The implementing release for the rules describes the Administrative Conference's approach to paralegal costs as follows:

> "Commenters also took varying positions on whether paralegal costs should be chargeable as expenses. We do not believe the rules should discourage the use of paralegals, which can be an important cost-saving measure. On the other hand, lawyers' practices with respect to charging for paralegal time, as with respect to other expenses such as duplicating, telephone charges and the like, vary according to locality, field of practice, and individual custom. We have decided not to designate specific items as compensable expenses. Instead, we will adopt a suggestion of the Treasury Department and revise the model rule to provide that expenses may be charged as a separate item if they are ordinarily so charged to the attorney's clients." Administrative Conference of the U. S., Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32905 (1981).

To the extent that this passage addresses the question presented at all, it seems to take the same approach that the

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[9] Compare *Northcross*, 611 F. 2d, at 638 ("[A] scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to Section 1988. The use of broad categories, differentiating between paralegal services, in-office services by experienced attorneys and trial service, would result in a fair and equitable fee"), with *id.*, at 639 ("The authority granted in section 1988 to award a reasonable attorney's fee included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of § 1988" (internal quotation marks omitted)).

Court took in *Jenkins* and that we adopt today: It allows the recovery of paralegal fees according to "the practice in the relevant market." 491 U. S., at 288. But we think the fairest interpretation of the implementing release is that it does not address how awards for paralegal fees should be calculated. Instead, it addresses the anterior question whether courts may award paralegal fees under EAJA at all. See, *e. g.*, 46 Fed. Reg. 32905 (responding to comments urging that the model rules "identify particular expenses of attorneys and witnesses that are compensable"). Like the other legislative authorities cited by the Government, the model rules fail to persuade us of the soundness of the Government's interpretation because they fail to clearly address the question presented.

B

We find the Government's policy rationale for recovery at attorney cost likewise unpersuasive. The Government argues that market-based recovery would distort litigant incentives because EAJA would cap paralegal and attorney's fees at the same rate. See 5 U. S. C. § 504(b)(1)(A) ("[A]ttorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee"). The Government observes that paralegal rates are lower than rates for attorneys operating in the same market. If EAJA reimbursed both attorney time and paralegal time at market rates, then the cap would clip more off the top of the attorney's rates than the paralegal's rates. According to the Government, a market-based scheme would encourage litigants to shift an inefficient amount of attorney work to paralegals, since paralegal fees could be recovered at a greater percentage of their full market value.

The problem with this argument, as Richlin points out, is that it proves too much. The same reasoning would imply

that agent fees should not be recoverable at market rates.[10] If market-based recovery of paralegal time resulted in excessive reliance on paralegals, then market-based recovery of agent time should result in excessive reliance on agents. The same reasoning would also imply that fees for junior attorneys (who generally bill at lower rates than senior attorneys) should not be recoverable at market rates. Cf. *Jenkins*, *supra*, at 287 ("If the fees are consistent with market rates and practices, the 'windfall' argument has no more force with regard to paralegals than it does for associates"). Yet despite the possibility that market-based recovery of attorney and agent fees would distort litigant incentives, §504 unambiguously authorizes awards of "reasonable attorney or agent fees . . . [at] prevailing market rates." 5 U. S. C. §504(b)(1)(A). The Government offers no persuasive reason why Congress would have treated paralegal fees any differently. The Government's policy rationale thus founders on the text of the statute, which shows that Congress was untroubled by the very distortion the Government seeks to prevent.

We also question the practical feasibility of the Government's interpretation of the statute. The Board in this case relied on the Internet for data on paralegal salaries in the District of Columbia, but the Government fails to explain why a law firm's cost should be limited to salary. The benefits and perks with which a firm compensates its staff come out of the bottom line no less than salary. The Government has offered no solution to this accounting problem, and we do not believe that solutions are readily to be found. Market

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[10] "'An "agent fee" may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it.'" Brief for Respondent 11, n. 4 (quoting H. R. Rep. No. 96–1418, p. 14 (1980)); see also n. 2, *supra*. Since federal courts generally do not permit nonattorneys to practice before them, the portion of EAJA governing awards for parties to federal litigation makes no provision for agent fees. Compare 28 U. S. C. §2412(d)(2)(A) with 5 U. S. C. §504(b)(1)(A).

practice provides by far the more transparent basis for calculating a prevailing party's recovery under EAJA. It strains credulity that Congress would have abandoned this predictable, workable framework for the uncertain and complex accounting requirements that a cost-based rule would inflict on litigants, their attorneys, administrative agencies, and the courts.

IV

Confronted with the flaws in its interpretation of the statute, the Government seeks shelter in a canon of construction. According to the Government, any right to recover paralegal fees under EAJA must be read narrowly in light of the statutory canon requiring strict construction of waivers of sovereign immunity. We disagree.

The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction. Indeed, the cases on which the Government relies all used other tools of construction in tandem with the sovereign immunity canon. See *Ardestani* v. *INS*, 502 U. S. 129, 137 (1991) (relying on the canon as "reinforce[ment]" for the independent "conclusion that any ambiguities in the legislative history are insufficient to undercut the ordinary understanding of the statutory language"); *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 682, 685–686 (1983) (relying on the canon in tandem with "historic principles of fee-shifting in this and other countries" to define the scope of a fee-shifting statute); *Department of Energy* v. *Ohio*, 503 U. S. 607, 626–627 (1992) (resorting to the canon only after a close reading of the statutory provision had left the Court "with an unanswered question and an unresolved tension between closely related statutory provisions"); see also *Smith* v. *United States*, 507 U. S. 197, 201–203 (1993) (invoking the sovereign immunity canon only after observing that the claimant's argument was "undermine[d]" by the "commonsense meaning" of the statutory language). In this case,

traditional tools of statutory construction and considerations of *stare decisis* compel the conclusion that paralegal fees are recoverable as attorney's fees at their "prevailing market rates." 5 U. S. C. § 504(b)(1)(A). There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe.

V

For these reasons, we hold that a prevailing party that satisfies EAJA's other requirements may recover its paralegal fees from the Government at prevailing market rates. The Board's contrary decision was error, and the Federal Circuit erred in affirming that decision. The judgment of the Federal Circuit is reversed, and this case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

ENGQUIST *v.* OREGON DEPARTMENT OF AGRICULTURE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–474. Argued April 21, 2008—Decided June 9, 2008

Petitioner Engquist, an Oregon public employee, filed suit against respondents—her agency, her supervisor, and a co-worker—asserting, *inter alia*, claims under the Equal Protection Clause: She alleged she had been discriminated against based on her race, sex, and national origin, and she also brought a so-called "class-of-one" claim, alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for arbitrary, vindictive, and malicious reasons. The jury rejected the class-membership equal protection claims, but found for Engquist on her class-of-one claim. The Ninth Circuit reversed in relevant part. Although recognizing that this Court had upheld a class-of-one equal protection challenge to state legislative and regulatory action in *Village of Willowbrook* v. *Olech*, 528 U. S. 562, the court below emphasized that this Court has routinely afforded government greater leeway when it acts as employer rather than regulator. The court concluded that extending the class-of-one theory to the public employment context would lead to undue judicial interference in state employment practices and invalidate public at-will employment.

Held: The class-of-one theory of equal protection does not apply in the public employment context. Pp. 597–609.

(a) There is a crucial difference between the government exercising "the power to regulate or license, as lawmaker," and acting "as proprietor, to manage [its] internal operation." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 896. Thus, in the public employment context, the Court has recognized that government has significantly greater leeway in its dealings with citizen employees than in bringing its sovereign power to bear on citizens at large. See, *e. g.*, *O'Connor* v. *Ortega*, 480 U. S. 709, 721–722. The relevant precedent establishes two main principles: First, government employees do not lose their constitutional rights when they go to work, but those rights must be balanced against the realities of the employment context. See, *e. g.*, *id.*, at 721. Second, in striking the appropriate balance, the Court considers whether the claimed employee right implicates the relevant constitutional provision's basic concerns, or whether the right can more readily

give way to the requirements of the government as employer. See, *e. g.*, *Connick* v. *Myers*, 461 U. S. 138. Pp. 597–600.

(b) The Court's equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan* v. *Maryland*, 366 U. S. 420, 425. *Olech* did recognize that a class-of-one equal protection claim can in some circumstances be sustained. Its recognition of that theory, however, was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle to the facts in that case: The government singled Olech out with regard to its regulation of property, and the cases upon which the Court relied concerned property assessment and taxation schemes that were applied in a singular way to particular citizens. What seems to have been significant in *Olech* and the cited cases was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. This differential treatment raised a concern of arbitrary classification, and therefore required that the State provide a rational basis for it. There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases treating like individuals differently is an accepted consequence of the discretion granted to governmental officials. This principle applies most clearly in the employment context, where decisions are often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. Unlike the context of arm's-length regulation, such as in *Olech*, treating seemingly similarly situated individuals differently in the employment context is par for the course. It is no proper challenge to what in its nature is a subjective and individualized decision that it was subjective and individualized. That the Court has never found the Equal Protection Clause implicated in this area is not surprising, given the historical understanding of the at-will nature of government employment. See, *e. g.*, *McElroy*, *supra*, at 896. Recognition of a claim that the State treated an employee differently from others for a bad reason, or for no reason at all, is simply contrary to the at-will concept. The Constitution does not require repudiating that familiar doctrine. Finally, the Court is guided, as in the past, by the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, *supra*, at 143. If class-of-one claims were recognized in the employment context, any personnel action in which a wronged employee can conjure up a claim of differential treatment would suddenly become the basis for a federal constitutional claim. The Equal Protection Clause does not require "[t]his displace-

Syllabus

ment of managerial discretion by judicial supervision." *Garcetti* v. *Ceballos*, 547 U. S. 410, 423. Pp. 601–609.

478 F. 3d 985, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 609.

Neal Katyal argued the cause for petitioner. With him on the briefs were *David H. Remes*, *Jeffrey C. Wu*, *Virginia A. Seitz*, *Jeffrey T. Green*, *Quin M. Sorenson*, *Craig A. Crispin*, and *Sarah O'Rourke Schrup*.

Janet A. Metcalf, Assistant Attorney General of Oregon, argued the cause for respondents. With her on the brief were *Hardy Myers*, Attorney General, *Peter Shepherd*, Deputy Attorney General, and *Mary H. Williams*, Solicitor General.

Lisa S. Blatt argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were former *Solicitor General Clement*, *Acting Solicitor General Garre*, *Acting Assistant Attorney General Bucholtz*, and *Irene M. Solet*.*

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*Briefs of *amici curiae* urging reversal were filed for the Lambda Legal Defense and Education Fund, Inc., et al. by *William M. Hohengarten*, *Jon W. Davidson*, *Susan L. Sommer*, *Steven R. Shapiro*, and *Gary D. Buseck*; for the National Association of Police Organizations, Inc., et al. by *William John Johnson* and *J. Michael McGuinness*; for the National Education Association et al. by *John M. West*, *Michael D. Simpson*, *Harold Craig Becker*, and *Jonathan P. Hiatt*; for the National Employment Lawyers Association by *Kathleen Eldergill*; for the National Fraternal Order of Police by *Larry H. James* and *Christina L. Corl*; for Richard Epstein et al. by *Aaron M. Panner*; and for Meir J. Westreich by *Mr. Westreich*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Pennsylvania et al. by *Thomas W. Corbett, Jr.*, Attorney General of Pennsylvania, *John G. Knorr III*, Chief Deputy Attorney General, and *Calvin R. Koons*, Senior Deputy Attorney General, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa,

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The question in this case is whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class. We hold that such a "class-of-one" theory of equal protection has no place in the public employment context.

I

Anup Engquist, the petitioner in this case, was hired in 1992 by Norma Corristan to be an international food standard specialist for the Export Service Center (ESC), a laboratory within the Oregon Department of Agriculture (ODA). During the course of her employment, Engquist experienced repeated problems with Joseph Hyatt, another ODA employee, complaining to Corristan that he had made false statements about her and otherwise made her life difficult. Corristan responded by directing Hyatt to attend diversity and anger management training.

In 2001, John Szczepanski, an assistant director of ODA, assumed responsibility over ESC, supervising Corristan, Hyatt, and Engquist. Szczepanski told a client that he could not "control" Engquist, and that Engquist and Corristan "would be gotten rid of." When Engquist and Hyatt both applied for a vacant managerial post within ESC,

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Mike McGrath of Montana, *Catherine Cortez Masto* of Nevada, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark Shurtleff* of Utah, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; for the League of California Cities et al. by *Brian P. Walter*; for the National Conference of State Legislatures et al. by *Richard Ruda*; and for the National School Boards Association by *Francisco M. Negrón, Jr.*, *Naomi Gittins*, *Lisa E. Soronen*, *Elizabeth Eynon-Kokrda*, and *Kenneth W. Hartman*.

Szczepanski chose Hyatt despite Engquist's greater experience in the relevant field. Later that year, during a round of across-the-board budget cuts in Oregon, Szczepanski eliminated Corristan's position. Finally, on January 31, 2002, Engquist was informed that her position was being eliminated because of reorganization. Engquist's collective-bargaining agreement gave her the opportunity either to "bump" to another position at her level, or to take a demotion. She was found unqualified for the only other position at her level and declined a demotion, and was therefore effectively laid off.

Engquist subsequently brought suit in the United States District Court for the District of Oregon against ODA, Szczepanski, and Hyatt, all respondents here, alleging violations of federal antidiscrimination statutes, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and state law. As to Engquist's equal protection claim, she alleged that the defendants discriminated against her on the basis of her race, sex, and national origin. She also brought what is known as a "class-of-one" equal protection claim, alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for "arbitrary, vindictive, and malicious reasons." App. 10.

The District Court granted the respondents' motion for summary judgment as to some of Engquist's claims, but allowed others to go forward, including each of the equal protection claims. As relevant to this case, the District Court found Engquist's class-of-one equal protection claim legally viable, deciding that the class-of-one theory was fully applicable in the employment context. Civ. No. 02–1637–AS (D Ore., Sept. 14, 2004), App. 49, 58, 2004 WL 2066748, *5. The court held that Engquist could succeed on that theory if she could prove "that she was singled out as a result of animosity on the part of Hyatt and Szczepanski"—*i. e.*, "that their actions were spiteful efforts to punish her for reasons unre-

lated to any legitimate state objective"—and if she could demonstrate, on the basis of that animosity, that "she was treated differently than others who were similarly situated." *Ibid.*

The jury rejected Engquist's claims of discrimination for membership in a suspect class—her race, sex, and national origin claims—but found in her favor on the class-of-one claim. Specifically, the jury found that Hyatt and Szczepanski "intentionally treat[ed] [Engquist] differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons." App. to Pet. for Cert. 3–4. The jury also found for Engquist on several of her other claims, and awarded her $175,000 in compensatory damages and $250,000 in punitive damages.

The Court of Appeals reversed in relevant part. It recognized that this Court had upheld a class-of-one equal protection challenge to state legislative and regulatory action in *Village of Willowbrook* v. *Olech*, 528 U. S. 562 (2000) (*per curiam*). 478 F. 3d 985, 992–993 (CA9 2007). The court below also acknowledged that other Circuits had applied *Olech* in the public employment context, 478 F. 3d, at 993 (citing cases), but it disagreed with those courts on the ground that our cases have routinely afforded government greater leeway when it acts as employer rather than regulator, *id.*, at 993–996. The court concluded that extending the class-of-one theory of equal protection to the public employment context would lead to undue judicial interference in state employment practices and "completely invalidate the practice of public at-will employment." *Id.*, at 995. The court accordingly held that the class-of-one theory is "inapplicable to decisions made by public employers with regard to their employees." *Id.*, at 996.

Judge Reinhardt dissented, "agree[ing] with the other circuits that the class-of-one theory of equal protection is appli-

cable to public employment decisions." *Id.*, at 1010. We granted certiorari to resolve this disagreement in the lower courts, 552 U. S. 1136 (2008), and now affirm.

II

Engquist argues that the Equal Protection Clause forbids public employers from irrationally treating one employee differently from others similarly situated, regardless of whether the different treatment is based on the employee's membership in a particular class. She reasons that in *Olech*, *supra*, we recognized in the regulatory context a similar class-of-one theory of equal protection, Brief for Petitioner 14–15; that the Equal Protection Clause protects individuals, not classes, *id.*, at 15–17; that the Clause proscribes "discrimination arising not only from a legislative act but also from the conduct of an administrative official," *id.*, at 17; and that the Constitution applies to the State not only when it acts as regulator, but also when it acts as employer, *id.*, at 23–29. Thus, Engquist concludes that class-of-one claims can be brought against public employers just as against any other state actors, *id.*, at 29–32, and that differential treatment of government employees—even when not based on membership in a class or group—violates the Equal Protection Clause unless supported by a rational basis, *id.*, at 32, 39–45.

We do not quarrel with the premises of Engquist's argument. It is well settled that the Equal Protection Clause "protect[s] persons, not groups," *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995) (emphasis deleted), and that the Clause's protections apply to administrative as well as legislative acts, see, *e. g.*, *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 35–36 (1907). It is equally well settled that States do not escape the strictures of the Equal Protection Clause in their role as employers. See, *e. g.*, *New York City Transit Authority* v. *Beazer*, 440 U. S. 568 (1979); *Harrah Independent School Dist.* v. *Martin*, 440 U. S. 194

(1979) (*per curiam*); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307 (1976) (*per curiam*). We do not, however, agree that Engquist's conclusion follows from these premises. Our traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications, combined with unique considerations applicable when the government acts as employer as opposed to sovereign, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context.

A

We have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising "the power to regulate or license, as lawmaker," and the government acting "as proprietor, to manage [its] internal operation." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 896 (1961). This distinction has been particularly clear in our review of state action in the context of public employment. Thus, "the government as employer indeed has far broader powers than does the government as sovereign." *Waters* v. *Churchill*, 511 U. S. 661, 671 (1994) (plurality opinion). "[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." *Id.*, at 674–675. See also *Connick* v. *Myers*, 461 U. S. 138, 150–151 (1983) (explaining that the government has a legitimate interest "in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service'" (quoting *Ex parte Curtis*, 106 U. S. 371, 373 (1882); alterations in original)). "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."

Waters, *supra*, at 675 (plurality opinion). Given the "common-sense realization that government offices could not function if every employment decision became a constitutional matter," *Connick*, *supra*, at 143, "constitutional review of government employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign," *Waters*, *supra*, at 674 (plurality opinion).

In light of these basic principles, we have often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large. Thus, for example, we have held that the Fourth Amendment does not require public employers to obtain warrants before conducting a search of an employee's office. *O'Connor* v. *Ortega*, 480 U. S. 709, 721–722 (1987) (plurality opinion). See also *id.*, at 732 (SCALIA, J., concurring in judgment). Although we recognized that the "legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial," we found that "[a]gainst these privacy interests . . . must be balanced the realities of the workplace, which strongly suggest that a warrant requirement would be unworkable." *Id.*, at 721 (plurality opinion). We have also found that the Due Process Clause does not protect a public employee from discharge, even when such discharge was mistaken or unreasonable. See *Bishop* v. *Wood*, 426 U. S. 341, 350 (1976) ("The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions").

Our public employee speech cases are particularly instructive. In *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968), we explained that, in analyzing a claim that a public employee was deprived of First Amendment rights by her employer, we must seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public

concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

We analyzed the contours of this balance more fully in *Connick* v. *Myers*, *supra*. We explained that the First Amendment protects public employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern. We recognized that the "'First Amendment does not protect speech and assembly only to the extent it can be characterized as political,'" and that the government therefore could not generally prohibit or punish, in its capacity as sovereign, speech on the ground that it does not touch upon matters of public concern, *id.*, at 147 (quoting *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 223 (1967)). But "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices." *Connick*, 461 U. S., at 146. As we explained, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.*, at 147 (citing *Bishop*, *supra*, at 349–350).

Our precedent in the public employee context therefore establishes two main principles: First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer. With these principles in mind, we come to the question whether a class-of-one theory of equal protection is cognizable in the public employment context.

B

Our equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961). See, *e. g.*, *Ross* v. *Moffitt*, 417 U. S. 600, 609 (1974) ("'Equal protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable"); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 60 (1973) (Stewart, J., concurring) ("[T]he basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes"). Plaintiffs in such cases generally allege that they have been arbitrarily classified as members of an "identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979).

Engquist correctly argues, however, that we recognized in *Olech* that an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called "class of one." In *Olech*, a property owner had asked the village of Willowbrook to connect her property to the municipal water supply. Although the village had required only a 15-foot easement from other property owners seeking access to the water supply, the village conditioned Olech's connection on a grant of a 33-foot easement. Olech sued the village, claiming that the village's requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause. Although Olech had not alleged that the village had discriminated against her based on membership in an identifiable class, we held that her complaint stated a valid claim under the Equal Protection Clause because it alleged that she had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U. S., at 564 (citing *Sioux City Bridge Co.* v.

Dakota County, 260 U. S. 441 (1923), and *Allegheny Pittsburgh Coal Co.* v. *Commission of Webster Cty.*, 488 U. S. 336 (1989)).

Recognition of the class-of-one theory of equal protection on the facts in *Olech* was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle. That case involved the government's regulation of property. Similarly, the cases upon which the Court in *Olech* relied concerned property assessment and taxation schemes. See *Allegheny Pittsburgh*, *supra*; *Sioux City Bridge*, *supra*. We expect such legislative or regulatory classifications to apply "without respect to persons," to borrow a phrase from the judicial oath. See 28 U. S. C. § 453. As we explained long ago, the Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes* v. *Missouri*, 120 U. S. 68, 71–72 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a "rational basis for the difference in treatment." *Olech*, 528 U. S., at 564.

What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such

determinations may be as a general zoning matter. See *id.*, at 565 (BREYER, J., concurring in result). Rather, the complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it.

In *Allegheny Pittsburgh*, cited by the *Olech* Court, the applicable standard was market value, but the county departed from that standard in basing some assessments on quite dated purchase prices. Again, there was no suggestion that the "dramatic differences in valuation" for similar property parcels, 488 U. S., at 341, were based on subjective considerations of the sort on which appraisers often rely, see *id.*, at 338–342, 345. *Sioux City Bridge*, also cited in *Olech*, was the same sort of case, recognizing an equal protection claim when one taxpayer's property was assessed at 100 percent of its value, while all other property was assessed at 55 percent, without regard to articulated differences in the properties. See 260 U. S., at 445–447.

There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of

people that did not get speeding tickets, and a "class of one" that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

This principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. As Engquist herself points out, "[u]nlike the zoning official, the public employer often must take into account the individual personalities and interpersonal relationships of employees in the workplace. The close relationship between the employer and employee, and the varied needs and interests involved in the employment context, mean that considerations such as concerns over personality conflicts that would be unreasonable as grounds for 'arm's-length' government decisions (*e. g.*, zoning, licensing) may well justify different treatment of a public employee." Brief for Petitioner 48. Unlike the context of arm's-length regulation, such as in *Olech*, treating seemingly similarly situated individuals differently in the employment context is par for the course.

Thus, the class-of-one theory of equal protection—which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review—is simply a poor fit in the public employment context. To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship. A challenge that one has been treated individually in this context, instead of like everyone else, is a challenge to the underlying nature of the government action.

Of course, that is not to say that the Equal Protection Clause, like other constitutional provisions, does not apply to public employers. Indeed, our cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently. See, *e. g.*, *Beazer*, 440 U. S., at 593 (upholding city's exclusion of methadone users from employment under rational-basis review); *Martin*, 440 U. S., at 199–201 (classification between teachers who had complied with a continuing-education requirement and those who had not is rational and does not violate the Equal Protection Clause); *Murgia*, 427 U. S., at 314–317 (upholding a mandatory retirement age—a classification based on age—under rational-basis review). The dissent's broad statement that we "excep[t] state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State," *post*, at 610 (opinion of STEVENS, J.), is thus plainly not correct. But we have never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner.

This is not surprising, given the historical understanding of the nature of government employment. We long ago recognized the "settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *McElroy*, 367 U. S., at 896. The basic principle of at-will employment is that an employee may be terminated for a "'good reason, bad reason, or no reason at all.'" Reply Brief for Petitioner 27. See *Andrews* v. *Louisville & Nashville R. Co.*, 406 U. S. 320, 324 (1972) ("[T]he very concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will"). Thus, "[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." *Waters*, 511 U. S., at 679 (plurality opinion). See also *Connick*, 461 U. S., at 146–147 ("[O]rdinary dismissals from government service . . . are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable" (citing *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972); *Perry* v. *Sindermann*, 408 U. S. 593 (1972); and *Bishop*, 426 U. S. 341)). "And an at-will government employee . . . generally has no claim based on the Constitution at all." *Waters*, *supra*, at 679 (plurality opinion). See, *e. g.*, *Bishop*, *supra*, at 349–350.

State employers cannot, of course, take personnel actions that would independently violate the Constitution. See *supra*, at 598–600. But recognition of a class-of-one theory of equal protection in the public employment context—that is, a claim that the State treated an employee differently from others for a bad reason, or for no reason at all—is simply contrary to the concept of at-will employment. The Constitution does not require repudiating that familiar doctrine.

To be sure, Congress and all the States have, for the most part, replaced at-will employment with various statutory

schemes protecting public employees from discharge for impermissible reasons. See, *e. g.*, 5 U. S. C. §2302(b)(10) (2006 ed.) (supervisor of covered federal employee may not "discriminate . . . on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others"). See also Brief for United States as *Amicus Curiae* 20–21. But a government's decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate.

Indeed, recognizing the sort of claim Engquist presses could jeopardize the delicate balance governments have struck between the rights of public employees and "the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.'" *Connick*, *supra*, at 150–151 (quoting *Ex parte Curtis*, 106 U. S., at 373; alterations in original). Thus, for example, although most federal employees are covered by the Civil Service Reform Act of 1978, 92 Stat. 1111, Congress has specifically excluded some groups of employees from its protection, see, *e. g.*, 5 U. S. C. §2302(a)(2)(C) (excluding from coverage, *inter alia*, the Federal Bureau of Investigation, the Central Intelligence Agency, and the Defense Intelligence Agency). Were we to find that the Equal Protection Clause subjects the government to equal protection review for every allegedly arbitrary employment action, we will have undone Congress's (and the States') careful work.

In concluding that the class-of-one theory of equal protection has no application in the public employment context—and that is all we decide—we are guided, as in the past, by the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, *supra*, at 143. If, as Engquist suggests, plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than

other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action—not only hiring and firing decisions, but any personnel action, such as promotion, salary, or work assignments—on the theory that other employees were not treated wrongfully. See 478 F. 3d, at 995. On Engquist's view, every one of these employment decisions by a government employer would become the basis for an equal protection complaint.

Engquist assures us that accepting her view would not pose too much of a practical problem. Specifically, Engquist argues that a plaintiff in a class-of-one employment case would have to prove that the government's differential treatment was intentional, that the plaintiff was treated differently from other similarly situated persons, and that the unequal treatment was not rationally related to a legitimate government purpose. Brief for Petitioner 36–39. And because a "governmental employment decision is . . . rational whenever the discrimination relates to a legitimate government interest," it is in practice "difficult for plaintiffs to show that the government has failed to meet this standard." *Id.*, at 41. JUSTICE STEVENS makes a similar argument, stating "that all but a handful [of class-of-one complaints] are dismissed well in advance of trial." *Post*, at 615.

We agree that, even if we accepted Engquist's claim, it would be difficult for a plaintiff to show that an employment decision is arbitrary. But this submission is beside the point. The practical problem with allowing class-of-one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack. The Equal Protec-

tion Clause does not require "[t]his displacement of managerial discretion by judicial supervision." *Garcetti* v. *Ceballos*, 547 U. S. 410, 423 (2006).

In short, ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly "constitutionalize the employee grievance." *Connick*, 461 U. S., at 154. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop*, 426 U. S., at 349. Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains, but the Equal Protection Clause is not one of them.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

Congress has provided a judicial remedy for individuals whose federal constitutional rights are violated by state action, 42 U. S. C. § 1983.[1] In prior cases, we have refused to craft *new* remedies for the violation of constitutional rights of federal employees, *Bush* v. *Lucas*, 462 U. S. 367 (1983), or for the nonconstitutional claims of state employees, *Bishop* v. *Wood*, 426 U. S. 341 (1976). But refusal to give effect to the congressionally mandated remedy embodied in § 1983 would be impermissible. To avoid this result, the Court today concludes that Engquist suffered no constitutional violation at all, and that there was thus no harm to be remedied.

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[1] Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

In so holding, the Court—as it did in *Garcetti* v. *Ceballos*, 547 U. S. 410 (2006)—carves a novel exception out of state employees' constitutional rights. In *Garcetti*, the Court created a new substantive rule excepting a category of speech by state employees from the protection of the First Amendment. Today, the Court creates a new substantive rule excepting state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State. Even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection "class of one" claims, the Court should use a scalpel rather than a meataxe.

I

Our decision in *Village of Willowbrook* v. *Olech*, 528 U. S. 562 (2000) *(per curiam)*, applied a rule that had been an accepted part of our equal protection jurisprudence for decades: Unless state action that intentionally singles out an individual, or a class of individuals, for adverse treatment is supported by some rational justification, it violates the Fourteenth Amendment's command that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Our opinion in *Olech* emphasized that the legal issue would have been the same whether the class consisted of one or five members, because "the number of individuals in a class is immaterial for equal protection analysis." *Id.*, at 564, n. The outcome of that case was not determined by the size of the disadvantaged class, and the majority does not—indeed cannot—dispute the settled principle that the Equal Protection Clause protects persons, not groups. See *ante*, at 597.

Nor did the outcome in *Olech* turn on the fact that the village was discriminating against a property owner rather than an employee. The majority does not dispute that the strictures of the Equal Protection Clause apply to the States in their role as employers as well as regulators. See *ante*,

at 597. And indeed, we have made clear that "the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgment of those protections." *Collins* v. *Harker Heights*, 503 U. S. 115, 119–120 (1992).

Rather, the outcome of *Olech* was dictated solely by the absence of a rational basis for the discrimination. As we explained:

> "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that '[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'
>
> " . . . [Olech's] complaint also alleged that the Village's demand was 'irrational and wholly arbitrary' . . . . These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis." 528 U. S., at 564, 565 (some internal quotation marks and citations omitted).

Here, as in *Olech*, Engquist alleged that the State's actions were arbitrary and irrational. In response, the State offered no explanation whatsoever for its decisions; it did not claim that Engquist was a subpar worker, or even that her personality made her a poor fit in the workplace or that her colleagues simply did not enjoy working with her. In fact,

the State explicitly *disclaimed* the existence of any workplace or performance-based rationale.[2] See, *e. g.*, Reply Brief for Petitioner 17, 19. The jury proceeded to find that the respondents intentionally treated Engquist "differently than others similarly situated with respect to the . . . termination of her employment . . . without any rational basis and solely for arbitrary, vindictive or malicious reasons." App. to Pet. for Cert. 3–4. The jury's verdict thus established that there was no rational basis for either treating Engquist differently from other employees or for the termination of her employment. The State does not dispute this finding. Under our reasoning in *Olech*, the absence of any justification for the discrimination sufficed to establish the constitutional violation.

The majority nonetheless concludes, based on "unique considerations applicable when the government acts as employer," that the "class-of-one" theory of equal protection is not applicable in the public-employment context. *Ante*, at 598. Its conclusion is based upon speculation about inapt hypothetical cases, and an incorrect evaluation of the importance of the government's interest in preserving a regime of "at-will" employment. Its reasoning is flawed on both counts.

II

The majority asserts that public-employment decisions should be carved out of our equal protection jurisprudence because employment decisions (as opposed to, for example, zoning decisions) are inherently discretionary. I agree that employers must be free to exercise discretionary authority. But there is a clear distinction between an exercise of discretion and an arbitrary decision. A discretionary decision rep-

[2] But for this disclaimer, the lower court could have dismissed the claim if it discerned "any reasonably conceivable state of facts that could provide a rational basis for the [State's actions]," even one not put forth by the State. *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 313 (1993). The disclaimer, however, negated that possibility.

resents a choice of one among two or more rational alternatives. See 1 H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 162 (Tent. ed. 1958) (defining discretion as "the power to choose between two or more courses of action each of which is thought of as permissible"). The choice may be mistaken or unwise without being irrational. If the arguments favoring each alternative are closely balanced, the need to make a choice may justify using a coin toss as a tiebreaker. Moreover, the Equal Protection Clause proscribes arbitrary decisions—decisions unsupported by any rational basis—not unwise ones. Accordingly, a discretionary decision with any "reasonably conceivable" rational justification will not support an equal protection claim; only a truly arbitrary one will. There is therefore no need to create an exception for the public-employment context in order to prevent these discretionary decisions from giving rise to equal protection claims.

The hypothetical situations posited by the majority do not prove otherwise. The hypothetical traffic officer described in the Court's opinion, *ante*, at 603–604, had a rational basis for giving a ticket to *every* speeder passing him on the highway. His inability to arrest every driver in sight provides an adequate justification for making a random choice from a group of equally guilty and equally accessible violators. As such, the Court is quite correct in stating that "allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action." *Ante*, at 604. If there were no justification for the arrest, there would be no need to invoke the Equal Protection Clause because the officer's conduct would violate the Fourth Amendment. But as noted, a random choice among rational alternatives does not violate the Equal Protection Clause.

A comparable hypothetical decision in the employment context (*e. g.*, a supervisor who is required to eliminate one

position due to an involuntary reduction in force and who chooses to terminate one of several equally culpable employees) also differs from the instant case insofar as it assumes the existence of a rational basis for the individual decision. The fact that a supervisor might not be able to explain why he terminated one employee rather than another will not give rise to an equal protection claim so long as there was a rational basis for the termination itself and for the decision to terminate just one, rather than all, of the culpable employees.

Instead of using a scalpel to confine so-called "class of one" claims to cases involving a complete absence of any conceivable rational basis for the adverse action and the differential treatment of the plaintiff, the Court adopts an unnecessarily broad rule that tolerates arbitrary and irrational decisions in the employment context.

III

The majority's decision also rests on the premise that "[t]he Constitution does not require repudiating th[e] familiar doctrine" of at-will employment. *Ante*, at 606. In the 1890's that doctrine applied broadly to government employment, see *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892), but for many years now "'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605–606 (1967). Indeed, recent constitutional decisions and statutory enactments have all but nullified the significance of the doctrine. See, *e. g.*, *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990); see also 5 U. S. C. § 2302(b)(10) (2006 ed.) (supervisor of covered federal employee may not "discriminate . . . on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others"). Accordingly, preserving the remnants of "at-will" employ-

ment provides a feeble justification for creating a broad exception to a well-established category of constitutional protections.[3]

IV

Presumably the concern that actually motivates today's decision is fear that governments will be forced to defend against a multitude of "class of one" claims unless the Court wields its meataxe forthwith. Experience demonstrates, however, that these claims are brought infrequently,[4] that the vast majority of such claims are asserted in complaints advancing other claims as well, and that all but a handful are dismissed well in advance of trial. Experience also demonstrates that there are in fact rare cases in which a petty tyrant has misused governmental power. Proof that such misuse was arbitrary because unsupported by any conceivable rational basis should suffice to establish a violation of the Equal Protection Clause without requiring its victim also to prove that the tyrant was motivated by a particular variety of class-based animus. When the allegations of a complaint plainly identify "the proverbial needle in a haystack," *ante*, at 608, a federal court should not misconstrue the Constitution in order to make it even easier to dismiss unmeritorious claims.

* * *

In sum, there is no compelling reason to carve arbitrary public employment decisions out of the well-established cate-

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[3] Moreover, equal protection scrutiny is not incompatible with at-will employment since courts applying rational-basis scrutiny are able to rely on any *conceivable* reason for government action, and the government therefore need not explain its actual reason for terminating or disciplining the employee.

[4] Prior to the Ninth Circuit's decision in this case, "class of one" claims arising in the public-employment context were permitted by every court that was presented with one. Yet there have been only approximately 150 cases—both in the district courts and the courts of appeals—addressing such claims since *Olech*.

gory of equal protection violations when the familiar rational review standard can sufficiently limit these claims to only wholly unjustified employment actions. Accordingly, I respectfully dissent.

Syllabus

QUANTA COMPUTER, INC., ET AL. *v.* LG ELECTRONICS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 06–937. Argued January 16, 2008—Decided June 9, 2008

The longstanding doctrine of patent exhaustion limits the patent rights that survive the initial authorized sale of a patented item. Respondent (LGE) purchased, *inter alia*, the computer technology patents at issue (LGE Patents): One discloses a system for ensuring that most current data are retrieved from main memory, one relates to the coordination of requests to read from and write to main memory, and one addresses the problem of managing data traffic on a set of wires, or "bus," connecting two computer components. LGE licensed the patents to Intel Corporation (Intel), in an agreement (License Agreement) that authorizes Intel to manufacture and sell microprocessors and chipsets using the LGE Patents (Intel Products) and that does not purport to alter patent exhaustion rules. A separate agreement (Master Agreement) required Intel to give its customers written notice that the license does not extend to a product made by combining an Intel Product with a non-Intel product, and provided that a breach of the agreement would not affect the License Agreement. Petitioner computer manufacturers (Quanta) purchased microprocessors and chipsets from Intel. Quanta then manufactured computers using Intel parts in combination with non-Intel parts, but did not modify the Intel components. LGE sued, asserting that this combination infringed the LGE Patents. The District Court granted Quanta summary judgment, but on reconsideration, denied summary judgment as to the LGE Patents because they contained method claims. The Federal Circuit affirmed in part and reversed in part, agreeing with the District Court that the patent exhaustion doctrine does not apply to method patents, which describe operations to make or use a product; and concluding, in the alternative, that exhaustion did not apply because LGE did not license Intel to sell the Intel Products to Quanta to combine with non-Intel products.

Held: Because the doctrine of patent exhaustion applies to method patents, and because the License Agreement authorizes the sale of components that substantially embody the patents in suit, the exhaustion doctrine prevents LGE from further asserting its patent rights with respect to the patents substantially embodied by those products. Pp. 625–638.

Syllabus

(a) The patent exhaustion doctrine provides that a patented item's initial authorized sale terminates all patent rights to that item. See, *e. g.*, *Bloomer* v. *McQuewan*, 14 How. 539. In the Court's most recent discussion of the doctrine, *United States* v. *Univis Lens Co.*, 316 U. S. 241, patents for finished eyeglass lenses, held by the respondent (Univis), did not survive the sale of lens blanks by the licensed manufacturer to wholesalers and finishing retailers who ground the blanks into patented finished lenses. The Court assumed that Univis' patents were practiced in part by the wholesalers and finishing retailers, concluding that the traditional bar on patent restrictions following an item's sale applies when the item sufficiently embodies the patent—even if it does not completely practice the patent—such that its only and intended use is to be finished under the patent's terms. The parties' arguments here are addressed with this patent exhaustion history in mind. Pp. 625–628.

(b) Nothing in this Court's approach to patent exhaustion supports LGE's argument that method claims, as a category, are never exhaustible. A patented method may not be sold in the same way as an article or device, but methods nonetheless may be "embodied" in a product, the sale of which exhausts patent rights. The Court has repeatedly found method patents exhausted by the sale of an item embodying the method. See *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 446, 457; *Univis*, *supra*, at 248–251. These cases rest on solid footing. Eliminating exhaustion for method patents would seriously undermine the exhaustion doctrine, since patentees seeking to avoid exhaustion could simply draft their claims to describe a method rather than an apparatus. On LGE's theory here, for example, although Intel is authorized to sell a completed computer system that practices the LGE Patents, downstream purchasers could be liable for patent infringement, which would violate the longstanding principle that, when a patented item is "once lawfully made and sold, there is no restriction on [its] *use* to be implied for the [patentee's] benefit," *Adams* v. *Burke*, 17 Wall. 453, 457. Pp. 628–630.

(c) The Intel Products embodied the patents here. *Univis* governs this case. There, exhaustion was triggered by the sale of the lens blanks because their only reasonable and intended use was to practice the patent and because they "embodie[d] essential features of [the] patented invention," 316 U. S., at 249–251. Each of those attributes is shared by the microprocessors and chipsets Intel sold to Quanta under the License Agreement. First, LGE has suggested no reasonable use for the Intel Products other than incorporating them into computer systems that practice the LGE Patents: A microprocessor or chipset cannot

Syllabus

function until it is connected to buses and memory. And as in *Univis*, the only apparent object of Intel's sales was to permit Quanta to incorporate the Intel Products into computers that would practice the patents. Second, like the *Univis* lens blanks, the Intel Products constitute a material part of the patented invention and all but completely practice the patent. The only step necessary to practice the patent is the application of common processes or the addition of standard parts. Everything inventive about each patent is embodied in the Intel Products. LGE's attempts to distinguish *Univis* are unavailing. Pp. 630–635.

(d) Intel's sale to Quanta exhausted LGE's patent rights. Exhaustion is triggered only by a sale authorized by the patent holder. *Univis*, *supra*, at 249. LGE argues that this sale was not authorized because the License Agreement does not permit Intel to sell its products for use in combination with non-Intel products to practice the LGE Patents. But the License Agreement does not restrict Intel's right to sell its products to purchasers who intend to combine them with non-Intel parts. Intel was required to give its customers notice that LGE had not licensed those customers to practice its patents, but neither party contends that Intel breached that agreement. In any event, the notice provision is in the Master Agreement, and LGE does not suggest that a breach of that agreement would constitute a License Agreement breach. Contrary to LGE's position, the question whether third parties may have received implied licenses is irrelevant, because Quanta asserts its right to practice the patents based not on implied license but on exhaustion, and exhaustion turns only on Intel's own license to sell products practicing the LGE Patents. LGE's alternative argument, invoking the principle that patent exhaustion does not apply to postsale restrictions on "making" an article, is simply a rephrasing of its argument that combining the Intel Products with other components adds more than standard finishing to complete a patented article. Pp. 635–637.

453 F. 3d 1364, reversed.

THOMAS, J., delivered the opinion for a unanimous Court.

Maureen E. Mahoney argued the cause for petitioners. With her on the briefs were *J. Scott Ballenger*, *Barry J. Blonien*, *Melissa B. Arbus*, *Vincent K. Yip*, *Peter Wied*, and *Maxwell A. Fox*.

Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were former *Solicitor General Clem-*

ent, *Assistant Attorneys General Keisler* and *Barnett*, *Deanne E. Maynard*, *Catherine G. O'Sullivan*, *David Seidman*, *Mark R. Freeman*, *James A. Toupin*, *Stephen Walsh*, *Shannon M. Hansen*, and *Heather F. Auyang*.

Carter G. Phillips argued the cause for respondent. With him on the brief were *Virginia A. Seitz*, *Jeffrey T. Green*, *Jeffrey P. Kushan*, *Rachel H. Townsend*, and *Quin M. Sorenson*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Antitrust Institute by *Albert A. Foer* and *Richard M. Brunell*; for the Automotive Engine Rebuilders Association et al. by *Seth D. Greenstein* and *Stefan M. Meisner*; for the Computer & Communications Industry Association by *Jonathan Band*; for the Consumers Union et al. by *Fred von Lohmann*, *Jason Schultz*, and *Marc N. Bernstein*; for Dell Inc. et al. by *Andrew J. Pincus* and *Carl J. Summers*; for Gen-Probe Inc. by *Beth S. Brinkmann*, *Ketanji Brown Jackson*, *Brian R. Matsui*, and *David C. Doyle*; for International Business Machines Corp. by *Traci L. Lovitt* and *Michael A. Carrin*; for Motorola, Inc., by *Russell E. Levine*; and for Nokia Corp. et al. by *Kathleen M. Sullivan* and *David L. Cohen*.

Briefs of *amici curiae* urging affirmance were filed for Acrotel, Ltd., et al. by *Michael J. Doyle*; for AmberWave Systems Corp. by *Song K. Jung*, *Lawrence S. Ebner*, *Adrian P. Mollo*, *Megan B. Hoffman*, and *Bryan P. Lord*; for iBiquity Digital Corp. by *Roderick R. McKelvie*, *Robert A. Long, Jr.*, *Richard L. Rainey*, and *Theodore P. Metzler, Jr.*; for InterDigital Communications, LLC, et al. by *Kenneth C. Bass III* and *Robert G. Sterne*; for MPEG LA LLC by *Garrard R. Beeney*, *Ann McLean Jordan*, and *Kenneth Rubenstein*; for Papst Licensing GmbH & Co. Kg by *Lawrence Rosenthal*, *Steven E. Feldman*, and *Leonard Friedman*; for Rembrandt IP Management, LLC, by *Aaron M. Panner*; for QUALCOMM Inc. by *Richard W. Clary*; for Various Law Professors by *F. Scott Kieff*; for Wi-LAN, Inc., by *Robert E. Goodfriend*, *James N. Willi*, and *Joel L. Thollander*; and for Yahoo! Inc. by *Christopher J. Wright*, *Timothy J. Simeone*, *Joseph K. Siino*, and *Lisa G. McFall*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Jeffrey I. D. Lewis*; for the American Seed Trade Association by *Gary Jay Kushner* and *Lorane F. Hebert*; for the Biotechnology Industry Organization by *Patricia A. Millett* and *Thomas C. Goldstein*; for CropLife International by *Seth P. Waxman*, *Paul R. Q. Wolfson*, and *Sambhav N. Sankar*; for the Intellectual Property Owners Association by *Gary M. Hoffman* and *Kenneth W. Brothers*; for the Licens-

JUSTICE THOMAS delivered the opinion of the Court.

For over 150 years this Court has applied the doctrine of patent exhaustion to limit the patent rights that survive the initial authorized sale of a patented item. In this case, we decide whether patent exhaustion applies to the sale of components of a patented system that must be combined with additional components in order to practice the patented methods. The Court of Appeals for the Federal Circuit held that the doctrine does not apply to method patents at all and, in the alternative, that it does not apply here because the sales were not authorized by the license agreement. We disagree on both scores. Because the exhaustion doctrine applies to method patents, and because the license authorizes the sale of components that substantially embody the patents in suit, the sale exhausted the patents.

I

Respondent LG Electronics, Inc. (LGE), purchased a portfolio of computer technology patents in 1999, including the three patents at issue here: U. S. Patent Nos. 4,939,641 ('641); 5,379,379 ('379); and 5,077,733 ('733) (collectively LGE Patents). The main functions of a computer system are carried out on a microprocessor, or central processing unit, which interprets program instructions, processes data, and controls other devices in the system. A set of wires, or bus, connects the microprocessor to a chipset, which transfers data between the microprocessor and other devices, including the keyboard, mouse, monitor, hard drive, memory, and disk drives.

The data processed by the computer are stored principally in random access memory, also called main memory. Webster's New World Dictionary of Computer Terms 334, 451

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ing Executives Society (U. S. A. & Canada), Inc., by *Joel E. Lutzker*; for NCR Corp. by *Morgan Chu* and *Laura W. Brill*; and for Technology Properties Limited by *Roger L. Cook*.

(8th ed. 2000). Frequently accessed data are generally stored in cache memory, which permits faster access than main memory and is often located on the microprocessor itself. *Id.*, at 84. When copies of data are stored in both the cache and main memory, problems may arise when one copy is changed but the other still contains the original "stale" version of the data. J. Handy, Cache Memory Book 124 (2d ed. 1993). The '641 patent addresses this problem. It discloses a system for ensuring that the most current data are retrieved from main memory by monitoring data requests and updating main memory from the cache when stale data are requested. *LG Electronics, Inc.* v. *Bizcom Electronics, Inc.*, 453 F. 3d 1364, 1377 (CA Fed. 2006).

The '379 patent relates to the coordination of requests to read from, and write to, main memory. *Id.*, at 1378. Processing these requests in chronological order can slow down a system because read requests are faster to execute than write requests. Processing all read requests first ensures speedy access, but may result in the retrieval of outdated data if a read request for a certain piece of data is processed before an outstanding write request for the same data. The '379 patent discloses an efficient method of organizing read and write requests while maintaining accuracy by allowing the computer to execute only read requests until it needs data for which there is an outstanding write request. *LG Electronics, Inc.* v. *Asustek Computer, Inc.*, No. C 01–02187 CW etc., Order Construing Disputed Terms and Phrases, p. 42 (ND Cal., Aug. 20, 2002). Upon receiving such a read request, the computer executes pending write requests first and only then returns to the read requests so that the most up-to-date data are retrieved. *Ibid.*

The '733 patent addresses the problem of managing the data traffic on a bus connecting two computer components, so that no one device monopolizes the bus. It allows multiple devices to share the bus, giving heavy users greater access. This patent describes methods that establish a rotating pri-

ority system under which each device alternately has priority access to the bus for a preset number of cycles and heavier users can maintain priority for more cycles without "hogging" the device indefinitely. *Id.*, at 37–38.

LGE licensed a patent portfolio, including the LGE Patents, to Intel Corporation (Intel). The cross-licensing agreement (License Agreement) permits Intel to manufacture and sell microprocessors and chipsets that use the LGE Patents (Intel Products). The License Agreement authorizes Intel to "'make, use, sell (directly or indirectly), offer to sell, import or otherwise dispose of'" its own products practicing the LGE Patents. Brief for Petitioners 8 (quoting App. 154).[1] Notwithstanding this broad language, the License Agreement contains some limitations. Relevant here, it stipulates that no license

> "'is granted by either party hereto . . . to any third party for the combination by a third party of Licensed Products of either party with items, components, or the like acquired . . . from sources other than a party hereto, or for the use, import, offer for sale or sale of such combination.'" Brief for Petitioners 8 (quoting App. 164).

The License Agreement purports not to alter the usual rules of patent exhaustion, however, providing that, "'[n]otwithstanding anything to the contrary contained in this Agreement, the parties agree that nothing herein shall in any way limit or alter the effect of patent exhaustion that would otherwise apply when a party hereto sells any of its Licensed Products.'" Brief for Petitioners 8 (quoting App. 164).

In a separate agreement (Master Agreement), Intel agreed to give written notice to its own customers informing them that, while it had obtained a broad license "'ensur[ing] that any Intel product that you purchase is licensed by LGE and thus does not infringe any patent held by LGE,'" the license

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[1] App. 145–198 is sealed; where material contained therein also appears in the parties' unsealed briefs, citations are to the latter.

"'does not extend, expressly or by implication, to any product that you make by combining an Intel product with any non-Intel product.'" Brief for Respondent 9 (quoting App. 198; emphasis deleted). The Master Agreement also provides that "'a breach of this Agreement shall have no effect on and shall not be grounds for termination of the Patent License.'" Brief for Petitioners 9 (quoting App. 176).

Petitioners, including Quanta Computer (collectively Quanta), are a group of computer manufacturers. Quanta purchased microprocessors and chipsets from Intel and received the notice required by the Master Agreement. Nonetheless, Quanta manufactured computers using Intel parts in combination with non-Intel memory and buses in ways that practice the LGE Patents. Quanta does not modify the Intel components and follows Intel's specifications to incorporate the parts into its own systems.

LGE filed a complaint against Quanta, asserting that the combination of the Intel Products with non-Intel memory and buses infringed the LGE Patents. The District Court granted summary judgment to Quanta, holding that, for purposes of the patent exhaustion doctrine, the license LGE granted to Intel resulted in forfeiture of any potential infringement actions against legitimate purchasers of the Intel Products. *LG Electronics, Inc.* v. *Asustek Computer Inc.*, 65 USPQ 2d 1589, 1593, 1600 (ND Cal. 2002). The court found that, although the Intel Products do not fully practice any of the patents at issue, they have no reasonable noninfringing use and therefore their authorized sale exhausted patent rights in the completed computers under *United States* v. *Univis Lens Co.*, 316 U. S. 241 (1942). *Asustek*, *supra*, at 1598–1600. In a subsequent order limiting its summary judgment ruling, the court held that patent exhaustion applies only to apparatus or composition-of-matter claims that describe a physical object, and does not apply to process, or method, claims that describe operations to make or use a product. *LG Electronics, Inc.* v. *Asustek Com-*

puter, Inc., 248 F. Supp. 2d 912, 918 (ND Cal. 2003). Because each of the LGE Patents includes method claims, exhaustion did not apply.

The Court of Appeals for the Federal Circuit affirmed in part and reversed in part. It agreed that the doctrine of patent exhaustion does not apply to method claims. In the alternative, it concluded that exhaustion did not apply because LGE did not license Intel to sell the Intel Products to Quanta for use in combination with non-Intel products. 453 F. 3d, at 1370.

We granted certiorari, 551 U. S. 1187 (2007).

II

The longstanding doctrine of patent exhaustion provides that the initial authorized sale of a patented item terminates all patent rights to that item. This Court first applied the doctrine in 19th-century cases addressing patent extensions on the Woodworth planing machine. Purchasers of licenses to sell and use the machine for the duration of the original patent term sought to continue using the licenses through the extended term. The Court held that the extension of the patent term did not affect the rights already secured by purchasers who bought the item for use "in the ordinary pursuits of life." *Bloomer* v. *McQuewan*, 14 How. 539, 549 (1853); see also *ibid.* ("[W]hen the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly"); *Bloomer* v. *Millinger*, 1 Wall. 340, 351 (1864). In *Adams* v. *Burke*, 17 Wall. 453 (1873), the Court affirmed the dismissal of a patent holder's suit alleging that a licensee had violated postsale restrictions on where patented coffin lids could be used. "[W]here a person ha[s] purchased a patented machine of the patentee or his assignee," the Court held, "this purchase carrie[s] with it the right to the use of that machine so long as it [is] capable of use." *Id.*, at 455.

Although the Court permitted postsale restrictions on the use of a patented article in *Henry* v. *A. B. Dick Co.*, 224 U. S.

1 (1912),[2] that decision was short lived. In 1913, the Court refused to apply *A. B. Dick* to uphold price-fixing provisions in a patent license. See *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 14–17 (1913). Shortly thereafter, in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 518 (1917), the Court explicitly overruled *A. B. Dick*. In that case, a patent holder attempted to limit purchasers' use of its film projectors to show only film made under a patent held by the same company. The Court noted the "increasing frequency" with which patent holders were using *A. B. Dick*-style licenses to limit the use of their products and thereby using the patents to secure market control of related, unpatented items. 243 U. S., at 509, 516–517. Observing that "the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents but is 'to promote the progress of science and useful arts,'" *id.*, at 511 (quoting U. S. Const., Art. I, §8, cl. 8), the Court held that "the scope of the grant which may be made to an inventor in a patent, pursuant to the [patent] statute, must be limited to the invention described in the claims of his patent," 243 U. S., at 511. Accordingly, it reiterated the rule that "the right to vend is exhausted by a single, unconditional sale, the article sold being thereby carried outside the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it." *Id.*, at 516.

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[2] The A. B. Dick Company sold mimeograph machines with an attached license stipulating that the machine could be used only with ink, paper, and other supplies made by the A. B. Dick Company. The Court rejected the notion that a patent holder "can only keep the article within the control of the patent by retaining the title," *A. B. Dick*, 224 U. S., at 18, and held that "any . . . reasonable stipulation, not inherently violative of some substantive law," was "valid and enforceable," *id.*, at 31. The only requirement, the Court held, was that "the purchaser must have notice that he buys with only a qualified right of use," so that a sale made without conditions resulted in "an unconditional title to the machine, with no limitations upon the use." *Id.*, at 26.

This Court most recently discussed patent exhaustion in *Univis*, 316 U. S. 241, on which the District Court relied. Univis Lens Company, the holder of patents on eyeglass lenses, licensed a purchaser to manufacture lens blanks[3] by fusing together different lens segments to create bi- and trifocal lenses and to sell them to other Univis licensees at agreed-upon rates. Wholesalers were licensed to grind the blanks into the patented finished lenses, which they would then sell to Univis-licensed prescription retailers for resale at a fixed rate. Finishing retailers, after grinding the blanks into patented lenses, would sell the finished lenses to consumers at the same fixed rate. The United States sued Univis under the Sherman Act, 15 U. S. C. §§ 1, 3, 15, alleging unlawful restraints on trade. Univis asserted its patent monopoly rights as a defense to the antitrust suit. The Court granted certiorari to determine whether Univis' patent monopoly survived the sale of the lens blanks by the licensed manufacturer and therefore shielded Univis' pricing scheme from the Sherman Act.

The Court assumed that the Univis patents containing claims for finished lenses were practiced in part by the wholesalers and finishing retailers who ground the blanks into lenses, and held that the sale of the lens blanks exhausted the patents on the finished lenses. *Univis*, 316 U. S., at 248–249. The Court explained that the lens blanks "embodi[ed] essential features of the patented device and [were] without utility until . . . ground and polished as the finished lens of the patent." *Id.*, at 249. The Court noted that

> "where one has sold an uncompleted article which, because it embodies essential features of his patented invention, is within the protection of his patent, and has

[3] Lens blanks are "rough opaque pieces of glass of suitable size, design and composition for use, when ground and polished, as multifocal lenses in eyeglasses." *Univis*, 316 U. S., at 244.

> destined the article to be finished by the purchaser in conformity to the patent, he has sold his invention so far as it is or may be embodied in that particular article." *Id.*, at 250–251.

In sum, the Court concluded that the traditional bar on patent restrictions following the sale of an item applies when the item sufficiently embodies the patent—even if it does not completely practice the patent—such that its only and intended use is to be finished under the terms of the patent.

With this history of the patent exhaustion doctrine in mind, we turn to the parties' arguments.

III

A

LGE argues that the exhaustion doctrine is inapplicable here because it does not apply to method claims, which are contained in each of the LGE Patents. LGE reasons that, because method patents are linked not to a tangible article but to a process, they can never be exhausted through a sale. Rather, practicing the patent—which occurs upon each use of an article embodying a method patent—is permissible only to the extent rights are transferred in an assignment contract. Quanta, in turn, argues that there is no reason to preclude exhaustion of method claims, and points out that both this Court and the Federal Circuit have applied exhaustion to method claims. It argues that any other rule would allow patent holders to avoid exhaustion entirely by inserting method claims in their patent specifications.

Quanta has the better of this argument. Nothing in this Court's approach to patent exhaustion supports LGE's argument that method patents cannot be exhausted. It is true that a patented method may not be sold in the same way as an article or device, but methods nonetheless may be "embodied" in a product, the sale of which exhausts patent rights. Our precedents do not differentiate transactions involving embodiments of patented methods or processes from

those involving patented apparatuses or materials. To the contrary, this Court has repeatedly held that method patents were exhausted by the sale of an item that embodied the method. In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 446, 457 (1940), for example, the Court held that the sale of a motor fuel produced under one patent also exhausted the patent for a method of using the fuel in combustion motors.[4] Similarly, as previously described, *Univis* held that the sale of optical lens blanks that partially practiced a patent exhausted the method patents that were not completely practiced until the blanks were ground into lenses. 316 U. S., at 248–251.

These cases rest on solid footing. Eliminating exhaustion for method patents would seriously undermine the exhaustion doctrine. Patentees seeking to avoid patent exhaustion could simply draft their patent claims to describe a method rather than an apparatus.[5] Apparatus and method claims "may approach each other so nearly that it will be difficult to distinguish the process from the function of the apparatus." *United States ex rel. Steinmetz* v. *Allen*, 192 U. S. 543, 559 (1904). By characterizing their claims as method instead of apparatus claims, or including a method claim for the ma-

[4] The patentee held patents for (1) a fluid additive increasing gasoline efficiency, (2) motor fuel produced by mixing gasoline with the patented fluid, and (3) a method of using fuel containing the patented fluid in combustion motors. *Ethyl Gasoline Corp.*, 309 U. S., at 446. The patentee sold only the fluid, but attempted to control sales of the treated fuel. *Id.*, at 459. The Court held that the sale of the fluid to refiners relinquished the patentee's exclusive rights to sell the treated fuel. *Id.*, at 457.

[5] One commentator recommends this strategy as a way to draft patent claims that "will survive numerous transactions regarding the patented good, allowing the force of the patent to intrude deeply into the stream of commerce." Thomas, Of Text, Technique, and the Tangible: Drafting Patent Claims Around Patent Rules, 17 J. Marshall J. Computer & Info. L. 219, 252 (1998); see also *id.*, at 225–226 (advocating the conversion of apparatus claims into method claims and noting that "[e]ven the most novice claims drafter would encounter scant difficulty in converting a patent claim from artifact to technique and back again").

chine's patented method of performing its task, a patent drafter could shield practically any patented item from exhaustion.

This case illustrates the danger of allowing such an end-run around exhaustion. On LGE's theory, although Intel is authorized to sell a completed computer system that practices the LGE Patents, any downstream purchasers of the system could nonetheless be liable for patent infringement. Such a result would violate the longstanding principle that, when a patented item is "once lawfully made and sold, there is no restriction on [its] *use* to be implied for the benefit of the patentee." *Adams*, 17 Wall., at 457. We therefore reject LGE's argument that method claims, as a category, are never exhaustible.

B

We next consider the extent to which a product must embody a patent in order to trigger exhaustion. Quanta argues that, although sales of an incomplete article do not necessarily exhaust the patent in that article, the sale of the microprocessors and chipsets exhausted LGE's patents in the same way the sale of the lens blanks exhausted the patents in *Univis*. Just as the lens blanks in *Univis* did not fully practice the patents at issue because they had not been ground into finished lenses, Quanta observes, the Intel Products cannot practice the LGE Patents—or indeed, function at all—until they are combined with memory and buses in a computer system. If, as in *Univis*, patent rights are exhausted by the sale of the incomplete item, then LGE has no postsale right to require that the patents be practiced using only Intel parts. Quanta also argues that exhaustion doctrine will be a dead letter unless it is triggered by the sale of components that essentially, even if not completely, embody an invention. Otherwise, patent holders could authorize the sale of computers that are complete with the exception of one minor step—say, inserting the microprocessor

into a socket—and extend their rights through each downstream purchaser all the way to the end user.

LGE, for its part, argues that *Univis* is inapplicable here for three reasons. First, it maintains that *Univis* should be limited to products that contain all the physical aspects needed to practice the patent. On that theory, the Intel Products cannot embody the patents because additional physical components are required before the patents can be practiced. Second, LGE asserts that in *Univis* there was no "patentable distinction" between the lens blanks and the patented finished lenses since they were both subject to the same patent. Brief for Respondent 14 (citing *Univis*, *supra*, at 248–252). In contrast, it describes the Intel Products as "independent and distinct products" from the systems using the LGE Patents and subject to "independent patents." Brief for Respondent 13. Finally, LGE argues that *Univis* does not apply because the Intel Products are analogous to individual elements of a combination patent, and allowing sale of those components to exhaust the patent would impermissibly "ascrib[e] to one element of the patented combination the status of [the] patented invention in itself." *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336, 344–345 (1961).

We agree with Quanta that *Univis* governs this case. As the Court there explained, exhaustion was triggered by the sale of the lens blanks because their only reasonable and intended use was to practice the patent and because they "embodie[d] essential features of [the] patented invention." 316 U. S., at 249–251. Each of those attributes is shared by the microprocessors and chipsets Intel sold to Quanta under the License Agreement.

First, *Univis* held that "the authorized sale of an article which is capable of use only in practicing the patent is a relinquishment of the patent monopoly with respect to the article sold." *Id.*, at 249. The lens blanks in *Univis* met

this standard because they were "without utility until [they were] ground and polished as the finished lens of the patent." *Ibid.* Accordingly, "the only object of the sale [was] to enable the [finishing retailer] to grind and polish it for use as a lens by the prospective wearer." *Ibid.* Here, LGE has suggested no reasonable use for the Intel Products other than incorporating them into computer systems that practice the LGE Patents.[6] Nor can we discern one: A microprocessor or chipset cannot function until it is connected to buses and memory. And here, as in *Univis*, the only apparent object of Intel's sales to Quanta was to permit Quanta to incorporate the Intel Products into computers that would practice the patents.

Second, the lens blanks in *Univis* "embodie[d] essential features of [the] patented invention." *Id.*, at 250–251. The essential, or inventive, feature of the Univis lens patents was the fusing together of different lens segments to create bi- and trifocal lenses. The finishing process performed by the finishing and prescription retailers after the fusing was not unique. As the United States explained:

> "The finishing licensees finish Univis lens blanks in precisely the same manner as they finish all other bifocal lens blanks. Indeed, appellees have never contended that their licensing system is supported by patents covering methods or processes relating to the finishing of

[6] LGE suggests that the Intel Products would not infringe its patents if they were sold overseas, used as replacement parts, or engineered so that use with non-Intel products would disable their patented features. Brief for Respondent 21–22, n. 10. But *Univis* teaches that the question is whether the product is "capable of use only in *practicing* the patent," not whether those uses are infringing. 316 U. S., at 249 (emphasis added). Whether outside the country or functioning as replacement parts, the Intel Products would still be *practicing* the patent, even if not infringing it. And since the features partially practicing the patent are what must have an alternative use, suggesting that they be disabled is no solution. The disabled features would have no real *use*.

> lens blanks. Consequently, it appears that appellees perform all of the operations which contribute any claimed element of novelty to Univis lenses." Brief for United States in *United States* v. *Univis Lens Co.*, O. T. 1941, No. 855 etc., p. 10 (footnote and citations omitted).

While the Court assumed that the finishing process was covered by the patents, *Univis*, *supra*, at 248–249, and the District Court found that it was necessary to make a working lens, *United States* v. *Univis Lens Co.*, 41 F. Supp. 258, 262–263 (SDNY 1941), the grinding process was not central to the patents. That standard process was not included in detail in any of the patents and was not referred to at all in two of the patents. Those that did mention the finishing process treated it as incidental to the invention, noting, for example, that "[t]he blank is then ground in the usual manner," U. S. Patent No. 1,876,497, p. 2, or simply that the blank is "then ground and polished," U. S. Patent No. 1,632,208, p. 1, Tr. of Record in *United States* v. *Univis Lens Co.*, O. T. 1941, No. 855 etc., pp. 516, 498.

Like the Univis lens blanks, the Intel Products constitute a material part of the patented invention and all but completely practice the patent. Here, as in *Univis*, the incomplete article substantially embodies the patent because the only step necessary to practice the patent is the application of common processes or the addition of standard parts. Everything inventive about each patent is embodied in the Intel Products. They control access to main and cache memory, practicing the '641 and '379 patents by checking cache memory against main memory and comparing read and write requests. They also control priority of bus access by various other computer components under the '733 patent. Naturally, the Intel Products cannot carry out these functions unless they are attached to memory and buses, but those additions are standard components in the system, providing the material that enables the microprocessors and chipsets to

function. The Intel Products were specifically designed to function only when memory or buses are attached; Quanta was not required to make any creative or inventive decision when it added those parts. Indeed, Quanta had no alternative but to follow Intel's specifications in incorporating the Intel Products into its computers because it did not know their internal structure, which Intel guards as a trade secret. Brief for Petitioners 3. Intel all but practiced the patent itself by designing its products to practice the patents, lacking only the addition of standard parts.

We are unpersuaded by LGE's attempts to distinguish *Univis*. First, there is no reason to distinguish the two cases on the ground that the articles in *Univis* required the *removal* of material to practice the patent while the Intel Products require the *addition* of components to practice the patent. LGE characterizes the lens blanks and lenses as sharing a "basic nature" by virtue of their physical similarity, while the Intel Products embody only some of the "patentably distinct elements and steps" involved in the LGE Patents. Brief for Respondent 26–27. But we think that the nature of the final step, rather than whether it consists of adding or deleting material, is the relevant characteristic. In each case, the final step to practice the patent is common and noninventive: grinding a lens to the customer's prescription, or connecting a microprocessor or chipset to buses or memory. The Intel Products embody the essential features of the LGE Patents because they carry out all the inventive processes when combined, according to their design, with standard components.

With regard to LGE's argument that exhaustion does not apply across patents, we agree on the general principle: The sale of a device that practices patent A does not, by virtue of practicing patent A, exhaust patent B. But if the device practices patent A *while substantially embodying* patent B, its relationship to patent A does not prevent exhaustion of patent B. For example, if the Univis lens blanks had been

composed of shatter-resistant glass under patent A, the blanks would nonetheless have substantially embodied, and therefore exhausted, patent B for the finished lenses. This case is no different. While each Intel microprocessor and chipset practices thousands of individual patents, including some LGE patents not at issue in this case, the exhaustion analysis is not altered by the fact that more than one patent is practiced by the same product. The relevant consideration is whether the Intel Products that partially practice a patent—by, for example, embodying its essential features—exhaust *that* patent.

Finally, LGE's reliance on *Aro* is misplaced because that case dealt only with the question whether replacement of one part of a patented combination infringes the patent. First, the replacement question is not at issue here. Second, and more importantly, *Aro* is not squarely applicable to the exhaustion of patents like the LGE Patents that do not disclose a new combination of existing parts. *Aro* described combination patents as "cover[ing] only the totality of the elements in the claim [so] that no element, separately viewed, is within the grant." 365 U. S., at 344; see also *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 667–668 (1944) (noting that, in a combination patent, "the combination is the invention and it is distinct from any" of its elements). *Aro*'s warning that no element can be viewed as central to or equivalent to the invention is specific to the context in which the combination itself is the only inventive aspect of the patent. In this case, the inventive part of the patent is not the fact that memory and buses are combined with a microprocessor or chipset; rather, it is included in the design of the Intel Products themselves and the way these products access the memory or bus.

C

Having concluded that the Intel Products embodied the patents, we next consider whether their sale to Quanta ex-

hausted LGE's patent rights. Exhaustion is triggered only by a sale authorized by the patent holder. *Univis*, 316 U. S., at 249.

LGE argues that there was no authorized sale here because the License Agreement does not permit Intel to sell its products for use in combination with non-Intel products to practice the LGE Patents. It cites *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U. S. 175 (1938), and *General Talking Pictures Corp.* v. *Western Elec. Co.*, 305 U. S. 124 (1938), in which the manufacturer sold patented amplifiers for commercial use, thereby breaching a license that limited the buyer to selling the amplifiers for private and home use. The Court held that exhaustion did not apply because the manufacturer had no authority to sell the amplifiers for commercial use, and the manufacturer "could not convey to petitioner what both knew it was not authorized to sell." 304 U. S., at 181. LGE argues that the same principle applies here: Intel could not convey to Quanta what both knew it was not authorized to sell, *i. e.*, the right to practice the patents with non-Intel parts.

LGE overlooks important aspects of the structure of the Intel-LGE transaction. Nothing in the License Agreement restricts Intel's right to sell its microprocessors and chipsets to purchasers who intend to combine them with non-Intel parts. It broadly permits Intel to "'make, use, [or] sell'" products free of LGE's patent claims. Brief for Petitioners 8 (quoting App. 154). To be sure, LGE did require Intel to give notice to its customers, including Quanta, that LGE had not licensed those customers to practice its patents. But neither party contends that Intel breached the agreement in that respect. Brief for Petitioners 9; Brief for Respondent 9. In any event, the provision requiring notice to Quanta appeared only in the Master Agreement, and LGE does not suggest that a breach of that agreement would constitute a breach of the License Agreement. Hence, Intel's authority to sell its products embodying the LGE Patents

was not conditioned on the notice or on Quanta's decision to abide by LGE's directions in that notice.

LGE points out that the License Agreement specifically disclaimed any license to third parties to practice the patents by combining licensed products with other components. Brief for Petitioners 8. But the question whether third parties received implied licenses is irrelevant because Quanta asserts its right to practice the patents based not on implied license but on exhaustion. And exhaustion turns only on Intel's own license to sell products practicing the LGE Patents.

Alternatively, LGE invokes the principle that patent exhaustion does not apply to postsale restrictions on "making" an article. Brief for Respondent 43. But this is simply a rephrasing of its argument that combining the Intel Products with other components adds more than standard finishing to complete a patented article. As explained above, making a product that substantially embodies a patent is, for exhaustion purposes, no different from making the patented article itself. In other words, no further "making" results from the addition of standard parts—here, the buses and memory—to a product that already substantially embodies the patent.

The License Agreement authorized Intel to sell products that practiced the LGE Patents. No conditions limited Intel's authority to sell products substantially embodying the patents. Because Intel was authorized to sell its products to Quanta, the doctrine of patent exhaustion prevents LGE from further asserting its patent rights with respect to the patents substantially embodied by those products.[7]

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[7] We note that the authorized nature of the sale to Quanta does not necessarily limit LGE's other contract rights. LGE's complaint does not include a breach-of-contract claim, and we express no opinion on whether contract damages might be available even though exhaustion operates to eliminate patent damages. See *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, 666 (1895) ("Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a

IV

The authorized sale of an article that substantially embodies a patent exhausts the patent holder's rights and prevents the patent holder from invoking patent law to control post-sale use of the article. Here, LGE licensed Intel to practice any of its patents and to sell products practicing those patents. Intel's microprocessors and chipsets substantially embodied the LGE Patents because they had no reasonable non-infringing use and included all the inventive aspects of the patented methods. Nothing in the License Agreement limited Intel's ability to sell its products practicing the LGE Patents. Intel's authorized sale to Quanta thus took its products outside the scope of the patent monopoly, and as a result, LGE can no longer assert its patent rights against Quanta. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

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question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws").

Syllabus

BRIDGE ET AL. *v.* PHOENIX BOND & INDEMNITY CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07–210. Argued April 14, 2008—Decided June 9, 2008

Each year the Cook County Treasurer's Office holds a public auction to sell its tax liens on delinquent taxpayers' property. To prevent any one buyer from obtaining a disproportionate share of the liens, the county adopted the "Single, Simultaneous Bidder Rule" (Rule), which requires each buyer to submit bids in its own name, prohibits a buyer from using "apparent agents, employees, or related entities" to submit simultaneous bids for the same parcel, and requires a registered bidder to submit a sworn affidavit affirming its compliance with the Rule. Petitioners and respondents regularly participate in the tax sales. Respondents filed suit, alleging that petitioners fraudulently obtained a disproportionate share of liens by filing false compliance attestations. As relevant here, they claim that petitioners violated and conspired to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) through a pattern of racketeering activity involving mail fraud, which occurred when petitioners sent property owners various notices required by Illinois law. The District Court dismissed the RICO claims for lack of standing, finding that respondents were not protected by the mail fraud statute because they did not receive the alleged misrepresentations. Reversing, the Seventh Circuit based standing on the injury respondents suffered when they lost the chance to obtain more liens, and found that respondents had sufficiently alleged proximate cause because they were immediately injured by petitioners' scheme. The court also rejected petitioners' argument that respondents are not entitled to relief under RICO because they had not received, and therefore had not relied on, any false statements.

Held: A plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations. Pp. 647–661.

(a) In 18 U. S. C. § 1964(c), RICO provides a private right of action for treble damages to "[a]ny person injured in his business or property by reason of a violation," as pertinent here, of § 1962(c), which makes it "unlawful for any person employed by or associated with" a qualifying enterprise "to conduct or participate . . . in the conduct of such enter-

prise's affairs through a pattern of racketeering activity," including "mail fraud," § 1961(1)(B). Mail fraud, in turn, occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice." § 1341. The gravamen of the offense is the scheme to defraud, and any "mailing . . . 'incident to an essential part of the scheme' . . . satisfies the mailing element," *Schmuck* v. *United States*, 489 U. S. 705, 712, even if the mailing "contain[s] no false information," *id.*, at 715. Once the relationship among these statutory provisions is understood, respondents' theory of the case is straightforward. Petitioners nonetheless argue that because the alleged pattern of racketeering activity is predicated on mail fraud, respondents must show that they relied on petitioners' fraudulent misrepresentations, which they cannot do because the misrepresentations were made to the county. Nothing on the statute's face imposes such a requirement. Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate racketeering act under RICO, even if no one relied on any misrepresentation, see *Neder* v. *United States*, 527 U. S. 1, 24–25; and one can conduct the affairs of a qualifying enterprise through a pattern of such acts without anyone relying on a fraudulent misrepresentation. Thus, no reliance showing is required to establish that a person has violated § 1962(c) by conducting an enterprise's affairs through a pattern of racketeering activity predicated on mail fraud. Nor can a first-party reliance requirement be derived from § 1964(c), which, by providing a right of action to "[a]ny person" injured by a violation of § 1962, suggests a breadth of coverage not easily reconciled with an implicit first-party reliance requirement. Moreover, a person can be injured "by reason of" a pattern of mail fraud even if he has not relied on any misrepresentations. For example, accepting respondents' allegations as true, they were harmed by petitioners' scheme when they lost valuable liens they otherwise would have been awarded. Pp. 647–650.

(b) None of petitioners' arguments—that under the "common-law meaning" rule, Congress should be presumed to have made reliance an element of a civil RICO claim predicated on a violation of the mail fraud statute; that a plaintiff bringing a RICO claim based on mail fraud must show reliance on the defendant's misrepresentations in order to establish proximate cause; and that RICO should be interpreted to require first-party reliance for fraud-based claims in order to avoid the "over federalization" of traditional state-law claims—persuades this Court to read a first-party reliance requirement into a statute that by its terms suggests none. Pp. 650–660.

477 F. 3d 928, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court.

Theodore M. Becker argued the cause for petitioners. With him on the briefs were *Peter Buscemi* and *Joseph Brooks*.

David W. DeBruin argued the cause for respondents. With him on the brief were *Ian Heath Gershengorn* and *Lowell E. Sachnoff*.

Eric D. Miller argued the cause for the United States as *amicus curiae* in support of respondents. On the brief were former *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Pratik A. Shah*.*

JUSTICE THOMAS delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO or Act), 18 U. S. C. §§ 1961–1968, provides a private right of action for treble damages to "[a]ny person injured in his business or property by reason of a violation" of the Act's criminal prohibitions. § 1964(c). The question presented in this case is whether a plaintiff asserting a RICO claim predi-

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Gene C. Schaerr*, *Linda T. Coberly*, *Charles B. Klein*, *Robin S. Conrad*, and *Amar D. Sarwal*; for the McKesson Corp. by *Beth S. Brinkmann* and *Brian R. Matsui*; and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *Richard Blumenthal*, Attorney General of Connecticut, *Robert B. Teitelman*, Assistant Attorney General, and *Barry C. Barnett*, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Lisa Madigan* of Illinois, *Mike McGrath* of Montana, *Gary K. King* of New Mexico, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, and *Robert E. Cooper, Jr.*, of Tennessee; for the International Association of Insurance Receivers by *C. Philip Curley*, *Cynthia H. Hyndman*, and *Robert S. Michaels*; and for the National Association of Shareholder and Consumer Attorneys by *Kevin P. Roddy* and *G. Robert Blakey*.

cated on mail fraud must plead and prove that it relied on the defendant's alleged misrepresentations. Because we agree with the Court of Appeals that a showing of first-party reliance is not required, we affirm.

I

Each year the Cook County, Illinois, Treasurer's Office holds a public auction at which it sells tax liens it has acquired on the property of delinquent taxpayers.[1] Prospective buyers bid on the liens, but not in cash amounts. Instead, the bids are stated as percentage penalties the property owner must pay the winning bidder in order to clear the lien. The bidder willing to accept the lowest penalty wins the auction and obtains the right to purchase the lien in exchange for paying the outstanding taxes on the property. The property owner may then redeem the property by paying the lienholder the delinquent taxes, plus the penalty established at the auction and an additional 12% penalty on any taxes subsequently paid by the lienholder. If the property owner does not redeem the property within the statutory redemption period, the lienholder may obtain a tax deed for the property, thereby in effect purchasing the property for the value of the delinquent taxes.

Because property acquired in this manner can often be sold at a significant profit over the amount paid for the lien, the auctions are marked by stiff competition. As a result, most parcels attract multiple bidders willing to accept the lowest penalty permissible—0%, that is to say, no penalty at all. (Perhaps to prevent the perverse incentive taxpayers would have if they could redeem their property from a winning bidder for less than the amount of their unpaid taxes, the county does not accept negative bids.) The lower limit

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[1] Because this case arises from the District Court's grant of petitioners' motion to dismiss, we "accept as true all of the factual allegations contained in [respondents'] complaint." *Erickson* v. *Pardus*, 551 U. S. 89, 94 (2007) *(per curiam)*.

of 0% creates a problem: Who wins when the bidding results in a tie? The county's solution is to allocate parcels "on a rotational basis" in order to ensure that liens are apportioned fairly among 0% bidders. App. 18.

But this creates a perverse incentive of its own: Bidders who, in addition to bidding themselves, send agents to bid on their behalf will obtain a disproportionate share of liens. To prevent this kind of manipulation, the county adopted the "Single, Simultaneous Bidder Rule," which requires each "tax buying entity" to submit bids in its own name and prohibits it from using "apparent agents, employees, or related entities" to submit simultaneous bids for the same parcel.[2] *Id.*, at 67. Upon registering for an auction, each bidder must submit a sworn affidavit affirming that it complies with the Single, Simultaneous Bidder Rule.

Petitioners and respondents are regular participants in Cook County's tax sales. In July 2005, respondents filed a complaint in the United States District Court for the Northern District of Illinois, contending that petitioners had fraudulently obtained a disproportionate share of liens by violating the Single, Simultaneous Bidder Rule at the auctions held from 2002 to 2005. According to respondents, peti-

[2] The Single, Simultaneous Bidder Rule provides that "one tax buying entity (principal) may not have its/his/her/their actual or apparent agents, employees, or related entities, directly or indirectly register under multiple registrations for the *intended or perceived* purpose of having more than one person bidding at the tax sale at the same time for the *intended or perceived* purpose of increasing the principal's likelihood of obtaining a successful bid on a parcel." App. 67. The rule defines "Related Bidding Entity" as "any individual, corporation, partnership, joint venture, limited liability company, business organization, or other entity that has a shareholder, partner, principal, officer, general partner or other person or entity having an ownership interest in common with, or contractual relationship with, any other registrant." *Ibid.* It further provides that "[t]he determination of whether registered entities are related, so as to prevent the entities from bidding at the same time, is in the *sole and exclusive discretion* of the Cook County Treasurer or her designated representatives." *Ibid.*

tioner Sabre Group, LLC, and its principal Barrett Rochman arranged for related firms to bid on Sabre Group's behalf and directed them to file false attestations that they complied with the Single, Simultaneous Bidder Rule. Having thus fraudulently obtained the opportunity to participate in the auction, the related firms collusively bid on the same properties at a 0% rate. As a result, when the county allocated liens on a rotating basis,[3] it treated the related firms as independent entities, allowing them collectively to acquire a greater number of liens than would have been granted to a single bidder acting alone. The related firms then purchased the liens and transferred the certificates of purchase to Sabre Group. In this way, respondents allege, petitioners deprived them and other bidders of their fair share of liens and the attendant financial benefits.

Respondents' complaint contains five counts. Counts I–IV allege that petitioners violated and conspired to violate RICO by conducting their affairs through a pattern of racketeering activity involving numerous acts of mail fraud. In support of their allegations of mail fraud, respondents assert that petitioners "mailed or caused to be mailed hundreds of mailings in furtherance of the scheme," *id.*, at 49, when they

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[3] Respondents' complaint does not elaborate on the county's rotational system. The Court of Appeals described it as follows: "If X bids 0% on ten parcels, and each parcel attracts five bids at that penalty rate, then the County awards X two of the ten parcels. Winners share according to the ratio of their bids to other identical bids." 477 F. 3d 928, 929 (CA7 2007). Petitioners object that this description is not supported by the record and inappropriately "inject[s] into the case an element of mathematical certainty that is missing from the complaint itself." Reply Brief for Petitioners 20. While a precise understanding of the county's system may be necessary to calculate respondents' damages, nothing in our disposition turns on this issue. For present purposes, it suffices that respondents allege they "suffered the loss of property related to the liens they would have been able to acquire, and the profits flowing therefrom, had [petitioners] not implemented their scheme and acquired liens in excess of their appropriate share through their violation of the County Rule." App. 50.

sent property owners various notices required by Illinois law. Count V alleges a state-law claim of tortious interference with prospective business advantage.

On petitioners' motion, the District Court dismissed respondents' RICO claims for lack of standing. It observed that "[o]nly [respondents] and other competing buyers, as opposed to the Treasurer or the property owners, would suffer a financial loss from a scheme to violate the Single, Simultaneous Bidder Rule." App. to Pet. for Cert. 17a. But it concluded that respondents "are not in the class of individuals protected by the mail fraud statute, and therefore are not within the 'zone of interests' that the RICO statute protects," because they "were not recipients of the alleged misrepresentations and, at best were indirect victims of the alleged fraud." *Id.*, at 18a. The District Court declined to exercise supplemental jurisdiction over respondents' tortious-interference claim and dismissed it without prejudice.

The Court of Appeals for the Seventh Circuit reversed. It first concluded that "[s]tanding is not a problem in this suit" because respondents suffered a "real injury" when they lost the valuable chance to acquire more liens, and because "that injury can be redressed by damages." 477 F. 3d 928, 930 (2007). The Court of Appeals next concluded that respondents had sufficiently alleged proximate cause under *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258 (1992), and *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451 (2006), because they (along with other losing bidders) were "immediately injured" by petitioners' scheme. 477 F. 3d, at 930–932. Finally, the Court of Appeals rejected petitioners' argument that respondents are not entitled to relief under RICO because they did not receive, and therefore did not rely on, any false statements: "A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." *Id.*, at 932.

With respect to this last holding, the Court of Appeals acknowledged that courts have taken conflicting views. By its count, "[t]hree other circuits that have considered this question agree . . . that the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements," *ibid.* (citing *Mid Atlantic Telecom, Inc.* v. *Long Distance Servs., Inc.*, 18 F. 3d 260, 263–264 (CA4 1994); *Systems Management, Inc.* v. *Loiselle*, 303 F. 3d 100, 103–104 (CA1 2002); *Ideal Steel Supply Corp.* v. *Anza*, 373 F. 3d 251, 263 (CA2 2004)), whereas two Circuits hold that the plaintiff must show that it in fact relied on the defendant's misrepresentations, 477 F. 3d, at 932 (citing *VanDenBroeck* v. *CommonPoint Mortgage Co.*, 210 F. 3d 696, 701 (CA6 2000); *Sikes* v. *Teleline, Inc.*, 281 F. 3d 1350, 1360–1361 (CA11 2002)). Compare also *Sandwich Chef of Texas, Inc.* v. *Reliance Nat. Indemnity Ins. Co.*, 319 F. 3d 205, 223 (CA5 2003) (recognizing "a narrow exception to the requirement that the plaintiff prove direct reliance on the defendant's fraudulent predicate act . . . when the plaintiff can demonstrate injury as a direct and contemporaneous result of [a] fraud committed against a third party"), with *Appletree Square I, L. P.* v. *W. R. Grace & Co.*, 29 F. 3d 1283, 1286–1287 (CA8 1994) (requiring the plaintiff to show that it detrimentally relied on the defendant's misrepresentations).

We granted certiorari, 552 U. S. 1087 (2008), to resolve the conflict among the Courts of Appeals on "the substantial question," *Anza*, *supra*, at 461, whether first-party reliance is an element of a civil RICO claim predicated on mail fraud.[4]

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[4]The Court considered a civil RICO claim predicated on mail fraud in its recent decision in *Anza*, 547 U. S. 451. There the Court held that proximate cause is a condition of recovery under 18 U. S. C. § 1962(c). The Court did not address the question whether reliance by the plaintiff is a required element of a RICO claim, the matter now before us. Cf. 547 U. S., at 475–478 (THOMAS, J., concurring in part and dissenting in part) (reaching the question and concluding that reliance is not an element of a civil RICO claim based on mail fraud).

II

We begin by setting forth the applicable statutory provisions. RICO's private right of action is contained in 18 U. S. C. § 1964(c), which provides in relevant part that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Section 1962 contains RICO's criminal prohibitions. Pertinent here is § 1962(c), which makes it "unlawful for any person employed by or associated with" an enterprise engaged in or affecting interstate or foreign commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." The term "racketeering activity" is defined to include a host of so-called predicate acts, including "any act which is indictable under . . . section 1341 (relating to mail fraud)." § 1961(1)(B).

The upshot is that RICO provides a private right of action for treble damages to any person injured in his business or property by reason of the conduct of a qualifying enterprise's affairs through a pattern of acts indictable as mail fraud. Mail fraud, in turn, occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice or attempting so to do." § 1341. The gravamen of the offense is the scheme to defraud, and any "mailing that is incident to an essential part of the scheme satisfies the mailing element," *Schmuck* v. *United States*, 489 U. S. 705, 712 (1989) (citation and internal quotation marks omitted), even if the mailing itself "contain[s] no false information," *id.*, at 715.

Once the relationship among these statutory provisions is understood, respondents' theory of the case is straightforward. They allege that petitioners devised a scheme to de-

fraud when they agreed to submit false attestations of compliance with the Single, Simultaneous Bidder Rule to the county. In furtherance of this scheme, petitioners used the mail on numerous occasions to send the requisite notices to property owners. Each of these mailings was an "act which is indictable" as mail fraud, and together they constituted a "pattern of racketeering activity." By conducting the affairs of their enterprise through this pattern of racketeering activity, petitioners violated § 1962(c). As a result, respondents lost the opportunity to acquire valuable liens. Accordingly, respondents were injured in their business or property by reason of petitioners' violation of § 1962(c), and RICO's plain terms give them a private right of action for treble damages.

Petitioners argue, however, that because the alleged pattern of racketeering activity consisted of acts of mail fraud, respondents must show that they relied on petitioners' fraudulent misrepresentations. This they cannot do, because the alleged misrepresentations—petitioners' attestations of compliance with the Single, Simultaneous Bidder Rule—were made to the county, not respondents. The *county* may well have relied on petitioners' misrepresentations when it permitted them to participate in the auction, but *respondents*, never having received the misrepresentations, could not have done so. Indeed, respondents do not even allege that they relied on petitioners' false attestations. Thus, petitioners submit, they fail to state a claim under RICO.

If petitioners' proposed requirement of first-party reliance seems to come out of nowhere, there is a reason: Nothing on the face of the relevant statutory provisions imposes such a requirement. Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation. See *Neder* v. *United States*, 527 U. S. 1, 24–25 (1999) ("The common-law requiremen[t] of 'justifiable reliance' . . . plainly ha[s] no place

in the [mail, wire, or bank] fraud statutes"). And one can conduct the affairs of a qualifying enterprise through a pattern of such acts without anyone relying on a fraudulent misrepresentation.

It thus seems plain—and indeed petitioners do not dispute—that no showing of reliance is required to establish that a person has violated § 1962(c) by conducting the affairs of an enterprise through a pattern of racketeering activity consisting of acts of mail fraud. See *Anza*, 547 U. S., at 476 (THOMAS, J., concurring in part and dissenting in part) ("Because an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of § 1962, without proof of reliance"). If reliance is required, then, it must be by virtue of § 1964(c), which provides the right of action. But it is difficult to derive a first-party reliance requirement from § 1964(c), which states simply that "[a]ny person injured in his business or property by reason of a violation of section 1962" may sue for treble damages. The statute provides a right of action to "[a]ny person" injured by the violation, suggesting a breadth of coverage not easily reconciled with an implicit requirement that the plaintiff show reliance in addition to injury in his business or property.

Moreover, a person can be injured "by reason of" a pattern of mail fraud even if he has not relied on any misrepresentations. This is a case in point. Accepting their allegations as true, respondents clearly were injured by petitioners' scheme: As a result of petitioners' fraud, respondents lost valuable liens they otherwise would have been awarded. And this is true even though they did not rely on petitioners' false attestations of compliance with the county's rules. Or, to take another example, suppose an enterprise that wants to get rid of rival businesses mails misrepresentations about them to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result

of the misrepresentations, it would certainly seem that they were injured in their business "by reason of" a pattern of mail fraud, even though they never received, and therefore never relied on, the fraudulent mailings. Yet petitioners concede that, on their reading of § 1964(c), the rival businesses would have no cause of action under RICO, Tr. of Oral Arg. 4, even though they were the primary and intended victims of the scheme to defraud.

Lacking textual support for this counterintuitive position, petitioners rely instead on a combination of common-law rules and policy arguments in an effort to show that Congress should be presumed to have made first-party reliance an element of a civil RICO claim based on mail fraud. None of petitioners' arguments persuades us to read a first-party reliance requirement into a statute that by its terms suggests none.

III

A

Petitioners first argue that RICO should be read to incorporate a first-party reliance requirement in fraud cases "under the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Neder*, *supra*, at 23. It has long been settled, they contend, that only the recipient of a fraudulent misrepresentation may recover for common-law fraud, and that he may do so "if, but only if . . . he relies on the misrepresentation in acting or refraining from action." 4 Restatement (Second) of Torts § 537 (1977). Given this background rule of common law, petitioners maintain, Congress should be presumed to have adopted a first-party reliance requirement when it created a civil cause of action under RICO for victims of mail fraud.

In support of this argument, petitioners point to our decision in *Beck* v. *Prupis*, 529 U. S. 494 (2000). There, we considered the scope of RICO's private right of action for violations of § 1962(d), which makes it "unlawful for any person

to conspire to violate" RICO's criminal prohibitions. The question presented was "whether a person injured by an overt act in furtherance of a conspiracy may assert a civil RICO conspiracy claim under § 1964(c) for a violation of § 1962(d) even if the overt act does not constitute 'racketeering activity.'" *Id.*, at 500. Answering this question in the negative, we held that "injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d)." *Id.*, at 505 (citation omitted). In so doing, we "turn[ed] to the well-established common law of civil conspiracy." *Id.*, at 500. Because it was "widely accepted" by the time of RICO's enactment "that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious," *id.*, at 501, we presumed "that when Congress established in RICO a civil cause of action for a person 'injured . . . by reason of' a 'conspir[acy],' it meant to adopt these well-established common-law civil conspiracy principles," *id.*, at 504 (quoting §§ 1964(c), 1962(d); alterations in original). We specifically declined to rely on the law of criminal conspiracy, relying instead on the law of civil conspiracy:

> "We have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), see *Salinas* v. *United States*, 522 U. S. 52, 63–65 (1997), a mere violation being all that is necessary for criminal liability. This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation. In other words, our task is to interpret §§ 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone. The obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy." *Id.*, at 501, n. 6.

Petitioners argue that, as in *Beck*, we should look to the common-law meaning of civil fraud in order to give content to the civil cause of action § 1964(c) provides for private injury by reason of a violation of § 1962(c) based on a pattern of mail fraud. The analogy to *Beck*, however, is misplaced. The critical difference between *Beck* and this case is that in § 1962(d) Congress used a term—"conspir[acy]"—that had a settled common-law meaning, whereas Congress included no such term in § 1962(c). Section 1962(c) does not use the term "fraud"; nor does the operative language of § 1961(1)(B), which defines "racketeering activity" to include "any act which is indictable under . . . section 1341." And the indictable act under § 1341 is not the fraudulent misrepresentation, but rather the use of the mails with the purpose of executing or attempting to execute a scheme to defraud. In short, the key term in § 1962(c)—"racketeering activity"—is a *defined* term, and Congress defined the predicate act not as fraud *simpliciter*, but mail fraud—a statutory offense unknown to the common law. In these circumstances, the presumption that Congress intends to adopt the settled meaning of common-law terms has little pull. Cf. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 162 (2008) (rejecting the argument that § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), incorporates common-law fraud). There is simply no "reason to believe that Congress would have defined 'racketeering activity' to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only when those acts would have been actionable under the common law." *Anza*, 547 U. S., at 477–478 (THOMAS, J., concurring in part and dissenting in part).

Nor does it help petitioners' cause that here, as in *Beck*, the question is not simply "what constitutes a violation of § 1962[(c)], . . . but rather the meaning of a civil cause of action for private injury by reason of such a violation." 529 U. S., at 501, n. 6. To be sure, *Beck* held that a plaintiff

cannot state a civil claim for conspiracy under § 1964(c) merely by showing a violation of § 1962(d) and a resulting injury. But in so doing, *Beck* relied not only on the fact that the term "conspiracy" had a settled common-law meaning, but also on the well-established common-law understanding of what it means to be injured by a conspiracy for purposes of bringing a civil claim for damages. See *id.*, at 501–504. No comparable understanding exists with respect to injury caused by an enterprise conducting its affairs through a pattern of acts indictable as mail fraud. And even the common-law understanding of injury caused by fraud does not support petitioners' argument. As discussed *infra*, at 656–657, the common law has long recognized that plaintiffs can recover in a variety of circumstances where, as here, their injuries result directly from the defendant's fraudulent misrepresentations to a third party.

For these reasons, we reject petitioners' contention that the "common-law meaning" rule dictates that reliance by the plaintiff is an element of a civil RICO claim predicated on a violation of the mail fraud statute. Congress chose to make mail fraud, not common-law fraud, the predicate act for a RICO violation. And "the mere fact that the predicate acts underlying a particular RICO violation happen to be fraud offenses does not mean that reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim." *Anza*, *supra*, at 476 (THOMAS, J., concurring in part and dissenting in part).

B

Petitioners next argue that even if Congress did not make first-party reliance an element of a RICO claim predicated on mail fraud, a plaintiff who brings such a claim must show that it relied on the defendant's misrepresentations in order to establish the requisite element of causation. In *Holmes*, we recognized that § 1964(c)'s "language can, of course, be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that

the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." 503 U. S., at 265–266 (footnote omitted). We nonetheless held that not "all factually injured plaintiffs" may recover under § 1964(c). *Id.*, at 266. Because Congress modeled § 1964(c) on other provisions that had been interpreted to "requir[e] a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well," we concluded that § 1964(c) likewise requires the plaintiff to establish proximate cause in order to show injury "by reason of" a RICO violation. *Id.*, at 268.

Proximate cause, we explained, is a flexible concept that does not lend itself to "'a black-letter rule that will dictate the result in every case.'" *Id.*, at 272, n. 20 (quoting *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 536 (1983)). Instead, we "use[d] 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," *Holmes*, 503 U. S., at 268, with a particular emphasis on the "demand for some direct relation between the injury asserted and the injurious conduct alleged," *ibid.*; see also *Anza*, *supra*, at 461 ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries"). The direct-relation requirement avoids the difficulties associated with attempting "to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors," *Holmes*, 503 U. S., at 269; prevents courts from having "to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries," *ibid.*; and recognizes the fact that "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any

of the problems attendant upon suits by plaintiffs injured more remotely," *id.*, at 269–270.[5]

Pointing to our reliance on common-law proximate-causation principles in *Holmes* and *Anza*, petitioners argue that "[u]nder well-settled common-law principles, proximate cause is established for fraud claims only where the plaintiff can demonstrate that he relied on the misrepresentation." Brief for Petitioners 28. In support of this argument, petitioners cite 3 Restatement (Second) of Torts §548A, which provides that "[a] fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance." Thus, petitioners conclude, "a plaintiff asserting a civil RICO claim predicated on mail fraud cannot satisfy the proximate cause requirement unless he can establish that his injuries resulted from his reliance on the defendant's fraudulent misrepresentation." Brief for Petitioners 28.

Petitioners' argument is twice flawed. First, as explained above, the predicate act here is not common-law fraud, but mail fraud. Having rejected petitioners' argument that reliance is an element of a civil RICO claim based on mail fraud, we see no reason to let that argument in through the back door by holding that the proximate-cause analysis under RICO must precisely track the proximate-cause analysis of a common-law fraud claim. "Reliance is not a general limitation on civil recovery in tort; it 'is a specialized condition

[5] Applying these principles in *Holmes*, the Court held that the Securities Investor Protection Corporation (SIPC) could not recover for injuries caused by a stock-manipulation scheme that prevented two broker-dealers from meeting obligations to their customers, thereby triggering SIPC's duty to reimburse the customers. 503 U. S., at 270–274. And in *Anza*, the Court applied the principles of *Holmes* to preclude a company from recovering profits it allegedly lost when a rival business was able to lower its prices because it failed to charge the requisite sales tax on cash sales. 547 U. S., at 456–461.

that happens to have grown up with common law fraud.'" *Anza*, 547 U. S., at 477 (THOMAS, J., concurring in part and dissenting in part) (quoting *Systems Management*, 303 F. 3d, at 104). That "specialized condition," whether characterized as an element of the claim or as a prerequisite to establishing proximate causation, simply has no place in a remedial scheme keyed to the commission of mail fraud, a statutory offense that is distinct from common-law fraud and that does not require proof of reliance.

Second, while it may be that first-party reliance is an element of a common-law fraud claim, there is no general common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it. The Restatement provision cited by petitioners certainly does not support that proposition. It provides only that the plaintiff's loss must be a foreseeable result of *someone's* reliance on the misrepresentation.[6] It does not say that only those who rely on the misrepresentation can suffer a legally cognizable injury. And any such notion would be contradicted by the long line of cases in which courts have permitted a plaintiff directly injured by a fraudulent misrepresentation to recover even though it was a third party, and not the plaintiff, who relied on the defendant's misrepresentation.[7] Indeed, so well established is the defendant's liability

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[6] In addition to 3 Restatement (Second) of Torts § 548A (1976), petitioners cite Comment *a* to that section, which provides that "[c]ausation, in relation to losses incurred by reason of a misrepresentation, is a matter of the recipient's reliance in fact upon the misrepresentation in taking some action or in refraining from it." Like § 548A itself, however, the comment does not support petitioners' argument. Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it. But that does not mean that the only injuries proximately caused by the misrepresentation are those suffered by the recipient.

[7] Such cases include *Rice* v. *Manley*, 66 N. Y. 82 (1876) (permitting plaintiffs who had arranged to buy a large quantity of cheese to recover against a defendant who induced the vendor to sell him the cheese by falsely

in such circumstances that the Restatement (Second) of Torts sets forth as a "[g]eneral [p]rinciple" that "[o]ne who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances." § 870. As an illustration, the Restatement provides the example of a defendant who "seeks to promote his own interests by telling a known falsehood to *or about* the plaintiff or his product." *Id.*, Comment *h* (emphasis added). And the Restatement specifically recognizes "a cause of action" in favor of the injured party where the defendant "defrauds another for the purpose of causing pecuniary harm to a third person." *Id.*, § 435A, Comment *a*. Petitioners' contention that proximate cause has traditionally incorporated a first-party reliance requirement for claims based on fraud cannot be reconciled with these authorities.

Nor is first-party reliance necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the

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representing to the vendor that plaintiffs no longer wished to purchase it); and *Gregory* v. *Brooks*, 35 Conn. 437 (1868) (permitting plaintiff wharf owner to recover against a defendant who, in order to deprive plaintiff of business, misrepresented himself to be a superintendent of wharves and ordered a vessel unloading at plaintiff's wharf to leave); see also Brief for Respondents 26–29 (collecting cases).

Petitioners argue that these cases are irrelevant because they would be treated today as specialized torts, such as wrongful interference with contractual relations, rather than as common-law fraud. See, *e. g.*, 4 Restatement (Second) of Torts § 767, Comment *c* (recognizing that "one [may be] liable to another for intentional interference with economic relations by inducing a third person by fraudulent misrepresentation not to do business with the other"). But petitioners miss the point. The cases are not cited as evidence that common-law fraud can be established without showing first-party reliance. Rather, they—along with the Restatement's recognition of specialized torts based on third-party reliance—show that a fraudulent misrepresentation can proximately cause actionable injury even to those who do not rely on the misrepresentation.

proximate-cause principles articulated in *Holmes* and *Anza*. Again, this is a case in point. Respondents' alleged injury—the loss of valuable liens—is the direct result of petitioners' fraud. It was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens. And here, unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue. Indeed, both the District Court and the Court of Appeals concluded that respondents and other losing bidders were the *only* parties injured by petitioners' misrepresentations. App. to Pet. for Cert. 17a; 477 F. 3d, at 931. Petitioners quibble with that conclusion, asserting that the county would be injured too if the taint of fraud deterred potential bidders from participating in the auction. But that eventuality, in contrast to respondents' direct financial injury, seems speculative and remote.

Of course, none of this is to say that a RICO plaintiff who alleges injury "by reason of" a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations. Cf. *Field* v. *Mans*, 516 U. S. 59, 66 (1995) ("No one, of course, doubts that some degree of reliance is required to satisfy the element of causation inherent in the phrase 'obtained by'" in 11 U. S. C. §523(a)(2)(A), which prohibits the discharge of debts for money or property "obtained by" fraud). In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation. If, for example, the county had not accepted petitioners' false attestations of compliance with the Single, Simultaneous Bidder Rule, and as a result had not permitted petitioners to participate in the auction, respondents' injury would never have materialized. In addition, the complete absence of reliance may prevent the plain-

tiff from establishing proximate cause. Thus, for example, if the county knew petitioners' attestations were false but nonetheless permitted them to participate in the auction, then arguably the county's actions would constitute an intervening cause breaking the chain of causation between petitioners' misrepresentations and respondents' injury.

Accordingly, it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation. "But the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action." *Anza*, 547 U. S., at 478 (THOMAS, J., concurring in part and dissenting in part). Nor does it transform first-party reliance into an indispensable requisite of proximate causation. Proof that the plaintiff relied on the defendant's misrepresentations may in some cases be sufficient to establish proximate cause, but there is no sound reason to conclude that such proof is always necessary. By the same token, the absence of first-party reliance may in some cases tend to show that an injury was not sufficiently direct to satisfy § 1964(c)'s proximate-cause requirement, but it is not in and of itself dispositive. A contrary holding would ignore *Holmes*' instruction that proximate cause is generally not amenable to bright-line rules.

C

As a last resort, petitioners contend that we should interpret RICO to require first-party reliance for fraud-based claims in order to avoid the "over-federalization" of traditional state-law claims. In petitioners' view, respondents' claim is essentially one for tortious interference with prospective business advantage, as evidenced by count V of their complaint. Such claims have traditionally been handled under state law, and petitioners see no reason why Con-

gress would have wanted to supplement traditional state-law remedies with a federal cause of action, complete with treble damages and attorney's fees, in a statute designed primarily to combat organized crime. See *Anza*, *supra*, at 471–475 (THOMAS, J., concurring in part and dissenting in part); *Beck*, 529 U. S., at 496–497. A first-party reliance requirement, they say, is necessary "to prevent garden-variety disputes between local competitors (such as this case) from being converted into federal racketeering actions." Reply Brief for Petitioners 3.

Whatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO to reflect their—or our—views of good policy. We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe. See, *e. g.*, *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 252 (1994) (rejecting the argument that "RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose"); *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 244 (1989) (rejecting "the argument for reading an organized crime limitation into RICO's pattern concept"); *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 481 (1985) (rejecting the view that RICO provides a private right of action "only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury' ").

We see no reason to change course here. RICO's text provides no basis for imposing a first-party reliance requirement. If the absence of such a requirement leads to the undue proliferation of RICO suits, the "correction must lie with Congress." *Id.*, at 499. "It is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Id.*, at 499–500.

IV

For the foregoing reasons, we hold that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Syllabus

ALLISON ENGINE CO., INC., ET AL. *v.* UNITED STATES EX REL. SANDERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07–214. Argued February 26, 2008—Decided June 9, 2008

The Navy contracted with two shipyards to build destroyers, each of which needed generator sets (Gen-Sets) for electrical power. The shipyards subcontracted with petitioner Allison Engine Company, Inc. (Allison Engine), to build Gen-Sets, Allison Engine subcontracted with petitioner General Tool Company (GTC) to assemble them, and GTC subcontracted with petitioner Southern Ohio Fabricators, Inc., to manufacture Gen-Set bases and enclosures. The subcontracts required that each Gen-Set be accompanied by a certificate of conformance (COC) certifying that the unit was manufactured according to Navy specifications. All of the funds paid under the contracts ultimately came from the U. S. Treasury.

Former GTC employees Sanders and Thacker (hereinafter respondents) brought this *qui tam* suit seeking to recover damages from petitioners under the False Claims Act (FCA), which, *inter alia*, imposes civil liability on any person who knowingly uses a "false . . . statement to get a false or fraudulent claim paid or approved by the Government," 31 U. S. C. §3729(a)(2), or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," §3729(a)(3). At trial, respondents introduced evidence that petitioners had issued COCs falsely stating that their work was completed in compliance with Navy specifications and that they had presented invoices for payment to the shipyards. They did not, however, introduce the invoices the shipyards submitted to the Navy. The District Court granted petitioners judgment as a matter of law, concluding that, absent proof that false claims were presented to the Government, respondents' evidence was legally insufficient under the FCA. The Sixth Circuit reversed in relevant part, holding, among other things, that respondents' §§3729(a)(2) and (3) claims did not require proof of an intent to cause a false claim to be paid by the Government; proof of an intent to cause such a claim to be paid by a private entity using Government funds was sufficient.

Held:

1. It is insufficient for a plaintiff asserting a §3729(a)(2) claim to show merely that the false statement's use resulted in payment or approval of the claim or that Government money was used to pay the false or

Syllabus

fraudulent claim. Instead, such a plaintiff must prove that the defendant intended that the false statement be material to the Government's decision to pay or approve the false claim. Pp. 668–672.

(a) The Sixth Circuit's interpretation of §3729(a)(2) impermissibly deviates from the statute's language, which requires the defendant to make a false statement "to get" a false or fraudulent claim "paid or approved by the Government." Because "to get" denotes purpose, a person must have the purpose of getting a false or fraudulent claim "paid or approved by the Government" in order to be liable. Moreover, getting such a claim "paid . . . by the Government" is not the same as getting it paid using "government funds." Under §3729(a)(2), a defendant must intend that the Government itself pay the claim. Eliminating this element of intent would expand the FCA well beyond its intended role of combating "fraud against the *Government*." *Rainwater* v. *United States*, 356 U. S. 590, 592. Pp. 668–669.

(b) The Government's contention that "paid . . . by the Government" does not mean literal Government payment is unpersuasive. The assertion that it is customary to say that the Government pays a bill when a recipient of Government funds uses those funds to pay involves a colloquial usage of the phrase "paid by" that is not customarily employed in statutory drafting, where precision is important and expected. Section 3729(c)'s definition of "claim" does not support the Government's argument. The definition allows a request to be a "claim" even if it is not made directly to the Government, but, under §3729(a)(2), it is necessary that the defendant intend that a claim be "paid . . . by the Government," not by another entity. Pp. 669–670.

(c) This does not mean, however, that §3729(a)(2) requires proof that a defendant's false statement was submitted to the Government. Because the section requires only that the defendant make the false statement for the purpose of getting "a false or fraudulent claim paid or approved by the Government," a subcontractor violates §3729(a)(2) if it submits a false statement to the prime contractor intending that contractor to use the statement to get the Government to pay its claim. However, if a subcontractor makes a false statement to a private entity but does not intend that the Government rely on the statement as a condition of payment, the direct link between the statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability. The Court's reading gives effect to Congress' efforts to protect the Government from loss due to fraud but also ensures that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct." *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451, 470. Pp. 671–672.

Syllabus

2. Similarly, it is not enough under § 3729(a)(3) for a plaintiff to show that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using money obtained from the Government. Instead, it must be shown that they intended "to defraud the Government." Where their alleged conduct involved the making of a false statement, it need not be shown that they intended the statement to be presented directly to the Government, but it must be established that they agreed that the statement would have a material effect on the Government's decision to pay the false or fraudulent claim. Pp. 672–673.

471 F. 3d 610, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court.

Theodore B. Olson argued the cause for petitioners. With him on the briefs were *Matthew D. McGill*, *Amir C. Tayrani*, *Glenn V. Whitaker*, *Victor A. Walton, Jr.*, *Michael J. Bronson*, *Lawrence R. Elleman*, *William A. Posey*, *W. Jeffrey Sefton*, *James J. Gallagher*, and *David P. Kamp*.

James B. Helmer, Jr., argued the cause for respondents. With him on the brief were *Paul B. Martins* and *Robert M. Rice*.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were former *Solicitor General Clement*, *Acting Assistant Attorney General Bucholtz*, *Deputy Solicitor General Kneedler*, *Douglas N. Letter*, and *Thomas M. Bondy*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Jonathan S. Franklin*, *Caroline M. Mew*, *Robin S. Conrad*, and *Amar D. Sarwal*; for Continental Common, Inc., et al. by *Thomas V. Murto III*; and for the Washington Legal Foundation by *John T. Boese*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for Grayson & Kubli, P. C., by *Alan M. Grayson* and *Victor A. Kubli*; for the Taxpayers Against Fraud Education Fund by *David C. Frederick*; for Marsha Farmer by *Brantly Harris* and *James W. McCartney*; for Senator Charles E. Grassley by *Frederick M. Morgan, Jr.*; and for Joel D. Hesch by *Mr. Hesch*, *pro se*.

JUSTICE ALITO delivered the opinion of the Court.

The False Claims Act (FCA) imposes civil liability on any person who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U. S. C. §3729(a)(2), and any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," §3729(a)(3). We granted review in this case to decide what a plaintiff asserting a claim under these provisions must show regarding the relationship between the making of a "false record or statement" and the payment or approval of "a false or fraudulent claim . . . by the Government."

Contrary to the decision of the Court of Appeals below, we hold that it is insufficient for a plaintiff asserting a §3729(a)(2) claim to show merely that "[t]he false statement's use . . . result[ed] in obtaining or getting payment or approval of the claim," 471 F. 3d 610, 621 (CA6 2006), or that "government money was used to pay the false or fraudulent claim," *id.*, at 622. Instead, a plaintiff asserting a §3729(a)(2) claim must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim. Similarly, a plaintiff asserting a claim under §3729(a)(3) must show that the conspirators agreed to make use of the false record or statement to achieve this end.

I

In 1985, the United States Navy entered into contracts with two shipbuilders, Bath Iron Works and Ingalls Shipbuilding (together the shipyards), to build a new fleet of *Arleigh Burke* class guided missile destroyers. Each destroyer required three generator sets (Gen-Sets) to supply all of the electrical power for the ship. The shipyards subcontracted with petitioner Allison Engine Company, Inc. (Allison Engine), formerly a division of General Motors, to build

90 Gen-Sets to be used in over 50 destroyers. Allison Engine in turn subcontracted with petitioner General Tool Company (GTC) to assemble the Gen-Sets, and GTC subcontracted with petitioner Southern Ohio Fabricators, Inc. (SOFCO), to manufacture bases and enclosures for the Gen-Sets. The Navy paid the shipyards an aggregate total of $1 billion for each new destroyer. Of that, Allison Engine was paid approximately $3 million per Gen-Set; GTC was paid approximately $800,000 per Gen-Set; and SOFCO was paid over $100,000 per Gen-Set. All of the funds used to pay petitioners ultimately came from the Federal Treasury.

The Navy's contract with the shipyards specified that every part of each destroyer be built in accordance with the Navy's baseline drawings and military standards. These requirements were incorporated into each of petitioners' subcontracts. In addition, the contracts required that each delivered Gen-Set be accompanied by a certificate of conformance (COC) certifying that the unit was manufactured in accordance with the Navy's requirements.

In 1995, Roger L. Sanders and Roger L. Thacker (hereinafter respondents), former employees of GTC, brought suit in the District Court for the Southern District of Ohio as *qui tam* relators seeking to recover damages pursuant to §3729, which renders liable any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," §3729(a)(1); any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," §3729(a)(2); and any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," §3729(a)(3).

Respondents alleged that the invoices submitted to the shipyards by Allison Engine, GTC, and SOFCO fraudulently sought payment for work that had not been done in accordance with contract specifications. Specifically, respondents

claimed that the gearboxes installed by Allison Engine in the first 52 Gen-Sets were defective and leaked oil; that GTC never conducted a required final quality inspection for approximately half of the first 67 Gen-Sets; and that the SOFCO welders who worked on the first 67 Gen-Sets did not meet military standards. Respondents also claimed that petitioners issued COCs claiming falsely that the Gen-Sets had been built to the contractually required specifications even though petitioners knew that those specifications had not been met.

The case was tried to a jury. At trial, respondents introduced evidence that petitioners had issued COCs that falsely stated that their work was completed in compliance with the Navy's requirements and that they had presented invoices for payment to the shipyards. Respondents did not, however, introduce the invoices submitted by the shipyards to the Navy. At the close of respondents' case, petitioners moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). Petitioners asserted that no reasonable jury could find a violation under §3729 because respondents had failed to adduce any evidence that a false or fraudulent claim had ever been presented to the Navy. The District Court granted petitioners' motion. No. 1–:95–cv–970, 2005 WL 713569 (SD Ohio, Mar. 11, 2005). The court rejected respondents' argument that they did not have to present evidence that a claim had been submitted to the Navy because they showed that Government funds had been used to pay the invoices that were presented to the shipyards. The District Court concluded that, absent proof that false claims were presented to the Government, respondents' evidence was legally insufficient under the FCA. *Id.*, at *10.

On appeal, a divided panel of the United States Court of Appeals for the Sixth Circuit reversed the District Court in relevant part. 471 F. 3d 610 (2006). The majority agreed with the District Court that liability under §3729(a)(1) re-

quires proof that a false claim was presented to the Government. However, the Court of Appeals held that the District Court erred in granting petitioners' motion for judgment as a matter of law with respect to respondents' §§3729(a)(2) and (3) claims. The Court of Appeals held that such claims do not require proof of an intent to cause a false claim to be paid by the Government. Rather, it determined that proof of an intent to cause a false claim to be paid by a private entity using Government funds was sufficient. In so holding, the Court of Appeals recognized that its decision conflicted with *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F. 3d 488 (CADC 2004) *(Totten)*, cert. denied, 544 U. S. 1032 (2005).

We granted certiorari to resolve the conflict over the proper interpretation of §§3729(a)(2) and (3). 552 U. S. 989 (2007).

II

A

We turn first to §3729(a)(2), and "[w]e start, as always, with the language of the statute." *Williams* v. *Taylor*, 529 U. S. 420, 431 (2000). Section 3729(a)(2) imposes civil liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."

The interpretation of §3729(a)(2) that was adopted by the Court of Appeals—and that is endorsed by respondents and the Government—impermissibly deviates from the statute's language. In the view of the Court of Appeals, it is sufficient for a §3729(a)(2) plaintiff to show that a false statement resulted in the use of Government funds to pay a false or fraudulent claim. 471 F. 3d, at 621–622. Under subsection (a)(2), however, the defendant must make the false record or statement "to get" a false or fraudulent claim "paid or approved by the Government." "[T]o get" denotes purpose, and thus a person must have the purpose of getting a false

or fraudulent claim "paid or approved by the Government" in order to be liable under §3729(a)(2). Additionally, getting a false or fraudulent claim "paid . . . by the Government" is not the same as getting a false or fraudulent claim paid using "government funds." *Id.*, at 622. Under §3729(a)(2), a defendant must intend that the Government itself pay the claim.

Eliminating this element of intent, as the Court of Appeals did, would expand the FCA well beyond its intended role of combating "fraud against the *Government*." See *Rainwater* v. *United States*, 356 U. S. 590, 592 (1958) (emphasis added). As the District of Columbia Circuit pointed out, the reach of §3729(a)(2) would then be "almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do." *Totten*, *supra*, at 496.

B

Defending the Court of Appeals' interpretation of §3729(a)(2), the Government contends that the phrase "paid . . . by the Government" does not mean that the Government must literally pay the bill. The Government maintains that it is customary to say that the Government pays a bill when a person who has received Government funds uses those funds to pay a bill. The Government provides this example: "'[W]hen a student says his college living expenses are "paid by" his parents, he typically does not mean that his parents send checks directly to his creditors. Rather, he means that his parents are the ultimate source of the funds he uses to pay those expenses.'" Brief for United States as *Amicus Curiae* 9 (quoting *Totten*, *supra*, at 506 (Garland, J., dissenting)).

This example is unpersuasive because it involves a colloquial usage of the phrase "paid by"—a usage that is not customarily employed in more formal contexts. For example, if a federal employee who receives all of his income from the

Government were asked in a formal inquiry to reveal who paid for, say, his new car or a vacation, the employee would not say that the Federal Government had footed the bill. In statutory drafting, where precision is both important and expected, the sort of colloquial usage on which the Government relies is not customary.

The Government is also wrong in arguing that the definition of the term "claim" in §3729(c) means that §3729(a)(2)'s use of the phrase "paid . . . by the Government" should not be read literally. Under this definition, a request for money or property need not be made directly to the Government in order to constitute a "claim." Instead, a "claim" may include a request or demand that is made to "a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." §3729(c). This definition of the word "claim" does not support the Government's argument because it does not alter the meaning of the phrase "by the Government" in §3729(a)(2). Under §3729(c)'s definition of "claim," a request or demand may constitute a "claim" even if the request is not made directly to the Government, but under §3729(a)(2) it is still necessary for the defendant to intend that a claim be "paid . . . by the Government" and not by another entity.[1]

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[1] This interpretation of §3729(a)(2) does not render superfluous the portion of §3729(c) providing that a "claim" may be made to a contractor, grantee, or other recipient of Government funding. This language makes it clear that there can be liability under §§3729(a)(1) and (2) where the request or demand for money or property that a defendant presents to a federal officer for payment or approval, §3729(a)(1), or that a defendant intends "to get . . . paid or approved by the Government," §3729(a)(2), may be a request or demand that was originally "made to" a contractor, grantee, or other recipient of federal funds and then forwarded to the Government.

C

This does not mean, however, as petitioners suggest, see Reply Brief 1, that §3729(a)(2) requires proof that a defendant's false record or statement was submitted to the Government. While §3729(a)(1) requires a plaintiff to prove that the defendant "present[ed]" a false or fraudulent claim to the Government, the concept of presentment is not mentioned in §3729(a)(2). The inclusion of an express presentment requirement in subsection (a)(1), combined with the absence of anything similar in subsection (a)(2), suggests that Congress did not intend to include a presentment requirement in subsection (a)(2). "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 452 (2002) (internal quotation marks omitted).

What §3729(a)(2) demands is not proof that the defendant caused a false record or statement to be presented or submitted to the Government but that the defendant made a false record or statement for the purpose of getting "a false or fraudulent claim paid or approved by the Government." Therefore, a subcontractor violates §3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim.[2] If a subcontrac-

[2] Section 3729(b) provides that the terms "knowing" and "knowingly" "mean that a person, with respect to information—(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." The statutory definition of these terms is easily reconcilable with our holding in this case for two reasons. First, the intent requirement we discern in §3729(a)(2) derives not from the term "knowingly," but rather from the infinitive phrase "to get." Second, §3729(b) refers to specific intent with regard to the truth or falsity of the "information,"

tor or another defendant makes a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim "by the Government." In such a situation, the direct link between the false statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability. Recognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute. Our reading of §3729(a)(2), based on the language of the statute, gives effect to Congress' efforts to protect the Government from loss due to fraud but also ensures that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct." *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451, 470 (2006) (internal quotation marks omitted).

III

Respondents also brought suit under §3729(a)(3), which makes liable any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Our interpretation of this language is similar to our interpretation of the language of §3729(a)(2). Under §3729(a)(3), it is not enough for a plaintiff to show that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using money obtained from the Government. Instead, it must be shown that the conspirators intended "to defraud the Government." Where the conduct that the conspirators are alleged to have agreed upon involved the making of a false record or statement, it must be shown that the conspirators had the purpose of "getting" the false record or statement to bring about the Government's payment of a false or fraud-

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while our holding refers to a defendant's purpose in making or using a false record or statement.

ulent claim. It is not necessary to show that the conspirators intended the false record or statement to be presented directly to the Government, but it must be established that they agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim.

This reading of subsection (a)(3) is in accord with our decision in *Tanner* v. *United States*, 483 U. S. 107 (1987), where we held that a conspiracy to defraud a federally funded private entity does not constitute a "conspiracy to defraud the United States" under 18 U. S. C. §371. 483 U. S., at 129. In *Tanner*, the Government argued that a recipient of federal financial assistance and the subject of federal supervision may itself be treated as "the United States." We rejected this reading of §371 as having "not even an arguable basis in the plain language of §371." *Id.*, at 131. Indeed, we concluded that such an interpretation "would have, in effect, substituted 'anyone receiving federal financial assistance and supervision' for the phrase 'the United States.'" *Id.*, at 132. Likewise, the interpretation urged on us by respondents would in effect substitute "paid by Government funds" for the phrase "paid or approved by the Government." Had Congress intended subsection (a)(3) to apply to anyone who conspired to defraud a recipient of Government funds, it would have so provided.

* * *

Because the decision of the Court of Appeals was based on an incorrect interpretation of §§3729(a)(2) and (3), we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

MUNAF ET AL. *v.* GEREN, SECRETARY OF THE ARMY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06–1666. Argued March 25, 2008—Decided June 12, 2008*

The Multinational Force–Iraq (MNF–I) is an international coalition force composed of 26 nations, including the United States. It operates in Iraq under the unified command of U. S. military officers, at the Iraqi Government's request, and in accordance with United Nations Security Council Resolutions. Pursuant to the U. N. mandate, MNF–I forces detain individuals alleged to have committed hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law.

Shawqi Omar and Mohammad Munaf (hereinafter petitioners) are American citizens who voluntarily traveled to Iraq and allegedly committed crimes there. They were each captured by military forces operating as part of the MNF–I; given hearings before MNF–I Tribunals composed of American officers, who concluded that petitioners posed threats to Iraq's security; and placed in the custody of the U. S. military operating as part of the MNF–I. Family members filed next-friend habeas corpus petitions on behalf of both petitioners in the United States District Court for the District of Columbia.

In Omar's case, after the Department of Justice informed Omar that the MNF–I had decided to refer him to the Central Criminal Court of Iraq for criminal proceedings, his attorney sought and obtained a preliminary injunction from the District Court barring Omar's removal from United States or MNF–I custody. Affirming, the D. C. Circuit first upheld the District Court's exercise of habeas jurisdiction, finding that *Hirota* v. *MacArthur*, 338 U. S. 197, did not preclude review because Omar, unlike the habeas petitioners in *Hirota*, had yet to be convicted by a foreign tribunal.

Meanwhile, the District Court in Munaf's case dismissed his habeas petition for lack of jurisdiction. The court concluded that *Hirota* controlled and required that the petition be dismissed for lack of jurisdiction because the American forces holding Munaf were operating as part of an international force—the MNF–I. The D. C. Circuit agreed and

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*Together with No. 07–394, *Geren, Secretary of the Army, et al.* v. *Omar et al.*, also on certiorari to the same court.

affirmed. It distinguished its prior decision in *Omar*, which upheld jurisdiction over Omar's habeas petition, on the grounds that Munaf had been convicted by a foreign tribunal while Omar had not.

Held:

1. The habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command. The Government's argument that the federal courts lack jurisdiction over the detainees' habeas petitions in such circumstances because the American forces holding Omar and Munaf operate as part of a multinational force is rejected. The habeas statute, 28 U. S. C. §2241(c)(1), applies to persons held "in custody under or by color of the authority of the United States." The disjunctive "or" in §2241(c)(1) makes clear that actual Government custody suffices for jurisdiction, even if that custody could be viewed as "under . . . color of" another authority, such as the MNF–I.

The Court also rejects the Government's contention that the District Court lacks jurisdiction in these cases because the multinational character of the MNF–I, like the multinational character of the tribunal at issue in *Hirota*, means that the MNF–I is not a United States entity subject to habeas. The present cases differ from *Hirota* in several respects. The Court in *Hirota* may have found it significant, in considering the nature of the tribunal established by General MacArthur, that in that case the Government argued that General MacArthur was not subject to United States authority, that his duty was to obey the Far Eastern Commission and not the U. S. War Department, and that no process this Court could issue would have any effect on his action. Here, in contrast, the Government acknowledges that U. S. military commanders answer to the President. These cases also differ from *Hirota* in that they concern American citizens, and the Court has indicated that habeas jurisdiction can depend on citizenship. See, *e. g.*, *Johnson* v. *Eisentrager*, 339 U. S. 763, 781. Pp. 685–688.

2. Federal district courts, however, may not exercise their habeas jurisdiction to enjoin the United States from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign to that sovereign for criminal prosecution. Because petitioners state no claim in their habeas petitions for which relief can be granted, their habeas petitions should have been promptly dismissed, and no injunction should have been entered. Pp. 689–705.

(a) The District Court abused its discretion in granting Omar a preliminary injunction, which the D. C. Circuit interpreted as prohibiting the Government from (1) transferring Omar to Iraqi custody, (2) sharing with the Iraqi Government details concerning any decision

to release him, and (3) presenting him to the Iraqi courts for investigation and prosecution, without even considering the merits of the habeas petition. A preliminary injunction is an "extraordinary and drastic remedy." It should never be awarded as of right, *Yakus* v. *United States*, 321 U. S. 414, 440, and requires a demonstration of, *inter alia*, "a likelihood of success on the merits," *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 428. But neither the District Court nor the D. C. Circuit considered the likelihood of success as to the merits of Omar's habeas petition. Instead, the lower courts concluded that the "jurisdictional issues" implicated by Omar's petition presented difficult and substantial questions. A difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction.

The foregoing analysis would require reversal and remand in each of these cases: The lower courts in Munaf erred in dismissing for want of jurisdiction, and the lower courts in Omar erred in issuing and upholding the preliminary injunction. Our review of a preliminary injunction, however, "is not confined to the act of granting the injunctio[n]." *City and County of Denver* v. *New York Trust Co.*, 229 U. S. 123, 136. Rather, a reviewing court has the power on appeal from an interlocutory order "to examine the merits of the case . . . and upon deciding them in favor of the defendant to dismiss the bill." *North Carolina R. Co.* v. *Story*, 268 U. S. 288, 292. In short, there are occasions when it is appropriate for a court reviewing a preliminary injunction to proceed to the merits; given that the present cases implicate sensitive foreign policy issues in the context of ongoing military operations, this is one of them. Pp. 689–692.

(b) Petitioners argue that they are entitled to habeas relief because they have a legally enforceable right not to be transferred to Iraqi authorities for criminal proceedings and because they are innocent civilians unlawfully detained by the Government. With respect to the transfer claim, they request an injunction prohibiting the Government from transferring them to Iraqi custody. With respect to the unlawful detention claim, they seek release but only to the extent it would not result in unlawful transfer to Iraqi custody. Because both requests would interfere with Iraq's sovereign right to "punish offenses against its laws committed within its borders," *Wilson* v. *Girard*, 354 U. S. 524, 529, petitioners' claims do not state grounds upon which habeas relief may be granted. Their habeas petitions should have been promptly dismissed, and no injunction should have been entered. Pp. 692–705.

(1) Habeas is governed by equitable principles. Thus, prudential concerns may "require a federal court to forgo the exercise of its habeas . . . power." *Francis* v. *Henderson*, 425 U. S. 536, 539. Here,

the unusual nature of the relief sought by petitioners suggests that habeas is not appropriate. Habeas is at its core a remedy for unlawful executive detention. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536. The typical remedy is, of course, release. See, *e. g.*, *Preiser* v. *Rodriguez*, 411 U. S. 475, 484. But the habeas petitioners in these cases do not want simple release; that would expose them to apprehension by Iraqi authorities for criminal prosecution—precisely what they went to federal court to avoid.

The habeas petitioners do not dispute that they voluntarily traveled to Iraq, that they remain detained within the sovereign territory of Iraq today, or that they are alleged to have committed serious crimes in Iraq. Indeed, Omar and Munaf both concede that, if they were not in MNF–I custody, Iraq would be free to arrest and prosecute them under Iraqi law. Further, Munaf is the subject of ongoing Iraqi criminal proceedings and Omar would be but for the present injunction. Given these facts, Iraq has a sovereign right to prosecute them for crimes committed on its soil, even if its criminal process does not come with all the rights guaranteed by the Constitution, see *Neely* v. *Henkel*, 180 U. S. 109, 123. As Chief Justice Marshall explained nearly two centuries ago, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136.

This Court has twice applied that principle in rejecting claims that the Constitution precludes the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial. *Wilson*, *supra*, at 529–530; *Neely*, *supra*, at 112–113, 122. Omar and Munaf concede that Iraq has a sovereign right to prosecute them for alleged violations of its law. Yet they went to federal court seeking an order that would allow them to defeat precisely that sovereign authority. But habeas corpus does not bar the United States from transferring a prisoner to the sovereign authority he concedes has a right to prosecute him. Petitioners' "release" claim adds nothing to their "transfer" claim and fails for the same reasons, given that the release they seek is release that would avoid transfer.

There is of course even more at issue here: *Neely* involved a charge of embezzlement and *Wilson* the peacetime actions of a serviceman. The present cases concern individuals captured and detained within an ally's territory during ongoing hostilities involving our troops. It would be very odd to hold that the Executive can transfer individuals such as those in the *Neely* and *Wilson* cases, but cannot transfer to an ally detainees captured by our Armed Forces for engaging in serious hostile acts against that ally in what the Government refers to as "an active theater of combat." Pp. 693–700.

Syllabus

(2) Petitioners' allegations that their transfer to Iraqi custody is likely to result in torture are a matter of serious concern but those allegations generally must be addressed by the political branches, not the Judiciary. The recognition that it is for the democratically elected branches to assess practices in foreign countries and to determine national policy in light of those assessments is nothing new. As Chief Justice Marshall explained in the *Schooner Exchange*, "exemptions from territorial jurisdiction . . . must be derived from the consent of the sovereign of the territory" and are "rather questions of policy than of law, . . . they are for diplomatic, rather than legal discussion." 7 Cranch, at 143, 146. In the present cases, the Government explains that it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result and that the State Department has determined that the Justice Ministry—the department which has authority over Munaf and Omar—as well as its prison and detention facilities, have generally met internationally accepted standards for basic prisoner needs. The Judiciary is not suited to second-guess such determinations. Pp. 700–703.

(3) Petitioners' argument that, under *Valentine* v. *United States ex rel. Neidecker*, 299 U. S. 5, the Executive lacks discretion to transfer a citizen to Iraqi custody unless "legal authority" to do so "is given by act of Congress or by the terms of a treaty," *id.*, at 9, is rejected. *Valentine* was an extradition case; the present cases involve the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory. *Wilson*, *supra*, also forecloses petitioners' contention. A Status of Forces Agreement there seemed to give the habeas petitioner a right to trial by an American military tribunal, rather than a Japanese court, 354 U. S., at 529, but this Court found no "constitutional or statutory" impediment to the Government's waiver of its jurisdiction in light of Japan's sovereign interest in prosecuting crimes committed within its borders, *id.*, at 530. Pp. 704–705.

No. 06–1666, 482 F. 3d 582; No. 07–394, 479 F. 3d 1, vacated and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court. SOUTER, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 706.

Then-Deputy Solicitor General Garre argued the cause for respondents in No. 06–1666 and petitioners in No. 07–394. With him on the briefs were former *Solicitor General Clement*, *Acting Assistant Attorney General Bucholtz*, *Daryl*

Joseffer, *Douglas N. Letter*, *Jonathan H. Levy*, and *Lewis S. Yelin*.

Joseph Margulies argued the cause for petitioners in No. 06–1666 and respondents in No. 07–394. With him on the brief were *Aziz Z. Huq*, *Jonathan Hafetz*, and *Eric M. Freedman*.†

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Multinational Force–Iraq (MNF–I) is an international coalition force operating in Iraq composed of 26 different nations, including the United States. The force operates under the unified command of United States military officers, at the request of the Iraqi Government, and in accordance with United Nations (U. N.) Security Council Resolutions. Pursuant to the U. N. mandate, MNF–I forces detain individuals alleged to have committed hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law.

These consolidated cases concern the availability of habeas corpus relief arising from the MNF–I's detention of American citizens who voluntarily traveled to Iraq and are alleged to have committed crimes there. We are confronted with

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†Briefs of *amici curiae* urging reversal in No. 06–1666 and affirmance in No. 07–394 were filed for the American Bar Association by *William H. Neukom*, *David J. Cynamon*, and *Matthew J. MacLean*; for the Associated Press et al. by *Paul M. Smith*; for the Constitution Project et al. by *Christopher T. Handman*, *Sharon Bradford Franklin*, and *John W. Whitehead*; for Former U. S. Diplomats and National Security Specialists by *Harold Hongju Koh*; for Non-Governmental Organizations by *John J. Gibbons*, *Lawrence S. Lustberg*, *Baher Azmy*, and *Jenny-Brooke Condon*; and for M. Cherif Bassiouni et al. by *Richard M. Zuckerman*.

Briefs of *amici curiae* were filed in both cases for the National Institute of Military Justice by *Daniel S. Floyd* and *Stephen A. Saltzburg*; and for Professors of Constitutional Law and of the Federal Courts by *Daniel F. Kolb* and *Judith Resnik*.

two questions. *First*, do United States courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens challenging their detention in Iraq by the MNF–I? *Second*, if such jurisdiction exists, may district courts exercise that jurisdiction to enjoin the MNF–I from transferring such individuals to Iraqi custody or allowing them to be tried before Iraqi courts?

We conclude that the habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition. Under circumstances such as those presented here, however, habeas corpus provides petitioners with no relief.

I

Pursuant to its U. N. mandate, the MNF–I has "'the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq.'" App. G to Pet. for Cert. in No. 07–394, p. 74a, ¶ 10 (quoting U. N. Security Council, U. N. Doc. S/Res/1546, ¶ 10 (June 2004)). To this end, the MNF–I engages in a variety of military and humanitarian activities. The multinational force, for example, conducts combat operations against insurgent factions, trains and equips Iraqi security forces, and aids in relief and reconstruction efforts.

MNF–I forces also detain individuals who pose a threat to the security of Iraq. The Government of Iraq retains ultimate responsibility for the arrest and imprisonment of individuals who violate its laws, but because many of Iraq's prison facilities have been destroyed, the MNF–I agreed to maintain physical custody of many such individuals during Iraqi criminal proceedings. MNF–I forces are currently holding approximately 24,000 detainees. An American military unit, Task Force 134, oversees detention operations and facilities in Iraq, including those located at Camp Cropper, the detention facility currently housing Shawqi Omar and

Mohammad Munaf (hereinafter petitioners). The unit is under the command of United States military officers who report to General David Petraeus.

A

Petitioner Shawqi Omar, an American-Jordanian citizen, voluntarily traveled to Iraq in 2002. In October 2004, Omar was captured and detained in Iraq by U. S. military forces operating as part of the MNF–I during a raid of his Baghdad home. Omar is believed to have provided aid to Abu Musab al-Zarqawi—the late leader of al Qaeda in Iraq—by facilitating his group's connection with other terrorist groups, bringing foreign fighters into Iraq, and planning and executing kidnapings in Iraq. The MNF–I searched his home in an effort to capture and detain insurgents who were associated with al-Zarqawi. The raid netted an Iraqi insurgent and four Jordanian fighters along with explosive devices and other weapons.

The captured insurgents gave sworn statements implicating Omar in insurgent cell activities. The four Jordanians testified that they had traveled to Iraq with Omar to commit militant acts against American and other Coalition forces. Each of the insurgents stated that, while living in Omar's home, they had surveilled potential kidnap victims and conducted weapons training. The insurgents explained that Omar's fluency in English allowed him to lure foreigners to his home in order to kidnap and sell them for ransom.

Following Omar's arrest, a three-member MNF–I Tribunal composed of American military officers concluded that Omar posed a threat to the security of Iraq and designated him a "security internee." The tribunal also found that Omar had committed hostile and warlike acts, and that he was an enemy combatant in the war on terrorism. In accordance with Article 5 of the Geneva Convention, Omar was permitted to hear the basis for his detention, make a statement, and call immediately available witnesses.

In addition to the review of his detention by the MNF–I Tribunal, Omar received a hearing before the Combined Review and Release Board (CRRB)—a nine-member board composed of six representatives of the Iraqi Government and three MNF–I officers. The CRRB, like the MNF–I Tribunal, concluded that Omar's continued detention was necessary because he posed a threat to Iraqi security. At all times since his capture, Omar has remained in the custody of the United States military operating as part of the MNF–I.

Omar's wife and son filed a next-friend petition for a writ of habeas corpus on Omar's behalf in the District Court for the District of Columbia. *Omar* v. *Harvey*, 479 F. 3d 1, 4 (CADC 2007). After the Department of Justice informed Omar that the MNF–I had decided to refer him to the Central Criminal Court of Iraq (CCCI) for criminal proceedings, his attorney sought and obtained a preliminary injunction barring Omar's "remov[al] . . . from United States or MNF–I custody." App. C to Pet. for Cert. in No. 07–394, at 59a. The order directed that

> "the [United States], their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having actual or implicit knowledge of this Order . . . shall not remove [Omar] from United States or MNF–I custody, or take any other action inconsistent with this court's memorandum opinion." *Ibid.*

The United States appealed and the Court of Appeals for the District of Columbia Circuit affirmed. *Omar*, 479 F. 3d 1. The Court of Appeals first upheld the District Court's exercise of habeas jurisdiction, finding that this Court's decision in *Hirota* v. *MacArthur*, 338 U. S. 197 (1948) (*per curiam*), did not preclude review. The Court of Appeals distinguished *Hirota* on the ground that Omar, unlike the petitioner in that case, had yet to be convicted by a foreign tribunal. 479 F. 3d, at 7–9. The Court of Appeals rec-

ognized, however, that the writ of habeas corpus could not be used to enjoin release. *Id.*, at 11. It therefore construed the injunction only to bar transfer to Iraqi custody and upheld the District Court's order insofar as it prohibited the United States from: (1) transferring Omar to Iraqi custody, *id.*, at 11–13; (2) sharing details concerning any decision to release Omar with the Iraqi Government, *id.*, at 13; and (3) presenting Omar to the Iraqi Courts for investigation and prosecution, *id.*, at 14.

Judge Brown dissented. She joined the panel's jurisdictional ruling, but would have vacated the injunction because, in her view, the District Court had no authority to enjoin a transfer that would allow Iraqi officials to take custody of an individual captured in Iraq—something the Iraqi Government "undeniably h[ad] a right to do." *Id.*, at 19. We granted certiorari. 552 U. S. 1074 (2007).

B

Petitioner Munaf, a citizen of both Iraq and the United States, voluntarily traveled to Iraq with several Romanian journalists. He was to serve as the journalists' translator and guide. Shortly after arriving in Iraq, the group was kidnaped and held captive for two months. After the journalists were freed, MNF–I forces detained Munaf based on their belief that he had orchestrated the kidnapings.

A three-judge MNF–I Tribunal conducted a hearing to determine whether Munaf's detention was warranted. The MNF–I Tribunal reviewed the facts surrounding Munaf's capture, interviewed witnesses, and considered the available intelligence information. Munaf was present at the hearing and had an opportunity to hear the grounds for his detention, make a statement, and call immediately available witnesses. At the end of the hearing, the tribunal found that Munaf posed a serious threat to Iraqi security, designated him a "security internee," and referred his case to the CCCI for criminal investigation and prosecution.

During his CCCI trial, Munaf admitted on camera and in writing that he had facilitated the kidnaping of the Romanian journalists. He also appeared as a witness against his alleged co-conspirators. Later in the proceedings, Munaf recanted his confession, but the CCCI nonetheless found him guilty of kidnaping. On appeal, the Iraqi Court of Cassation vacated Munaf's conviction and remanded his case to the CCCI for further investigation. *In re Hikmat*, No. 19/Pub. Comm'n/2007, p. 5 (Feb. 19, 2008). The Court of Cassation directed that Munaf was to "remain in custody pending the outcome" of further criminal proceedings. *Ibid.*

Meanwhile, Munaf's sister filed a next-friend petition for a writ of habeas corpus in the District Court for the District of Columbia. *Mohammed* v. *Harvey*, 456 F. Supp. 2d 115, 118 (2006). The District Court dismissed the petition for lack of jurisdiction, finding that this Court's decision in *Hirota* controlled: Munaf was "in the custody of coalition troops operating under the aegis of MNF–I, who derive their ultimate authority from the United Nations and the MNF–I member nations acting jointly." 456 F. Supp. 2d, at 122.

The Court of Appeals for the District of Columbia Circuit affirmed. 482 F. 3d 582 (2007) (hereinafter *Munaf*). The Court of Appeals, "[c]onstrained by precedent," agreed with the District Court that *Hirota* controlled and dismissed Munaf's petition for lack of jurisdiction. 482 F. 3d, at 583. It distinguished the prior opinion in *Omar* on the ground that Munaf, like the habeas petitioner in *Hirota* but unlike Omar, had been convicted by a foreign tribunal. 482 F. 3d, at 583–584.

Judge Randolph concurred in the judgment. *Id.*, at 585. He concluded that the District Court had improperly dismissed for want of jurisdiction because "Munaf is an American citizen . . . held by American forces overseas." *Ibid.* Nevertheless, Judge Randolph would have held that Munaf's habeas petition failed on the merits. *Id.*, at 586. He relied on this Court's holding in *Wilson* v. *Girard*, 354 U. S. 524,

529 (1957), that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders," and concluded that the fact that the United States was holding Munaf because of his conviction by a foreign tribunal was conclusive, *ibid.*[1]

We granted certiorari and consolidated the *Omar* and *Munaf* cases. 552 U. S. 1074 (2007).

II

The Solicitor General argues that the federal courts lack jurisdiction over the detainees' habeas petitions because the American forces holding Omar and Munaf operate as part of a multinational force. Brief for Federal Parties 17–36. The habeas statute provides that a federal district court may entertain a habeas application by a person held "in custody under or by color of the authority of the United States," or "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §§2241(c)(1), (3). MNF–I forces, the argument goes, "are not operating solely under United States authority, but rather 'as the agent of' a multinational force." Brief for Federal Parties 23 (quoting *Hirota*, 338 U. S., at 198). Omar and Munaf are thus held pursuant to international authority, not "the authority of the United States," §2241(c)(1), and they are therefore not within the reach of the habeas statute. Brief for Federal Parties 17–18.[2]

The United States acknowledges that Omar and Munaf are American citizens held overseas in the immediate "'physical custody'" of American soldiers who answer only to an American chain of command. *Id.*, at 21. The MNF–I itself operates subject to a unified American command. *Id.*, at 23.

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[1] As noted above, Munaf's conviction was subsequently vacated by an Iraqi appellate court, and he is awaiting a new trial.

[2] These cases concern only American citizens and only the statutory reach of the writ. Nothing herein addresses jurisdiction with respect to alien petitioners or with respect to the constitutional scope of the writ.

"[A]s a practical matter," the Government concedes, it is "the President and the Pentagon, the Secretary of Defense, and the American commanders that control what . . . American soldiers do," Tr. of Oral Arg. 15, including the soldiers holding Munaf and Omar. In light of these admissions, it is unsurprising that the United States has never argued that it lacks the authority to release Munaf or Omar, or that it requires the consent of other countries to do so.

We think these concessions the end of the jurisdictional inquiry. The Government's argument—that the federal courts have no jurisdiction over American citizens held by American forces operating as multinational agents—is not easily reconciled with the text of §2241(c)(1). See *Duncan* v. *Walker*, 533 U. S. 167, 172 (2001) ("We begin, as always, with the language of the statute"). That section applies to persons held "in custody under or by color of the authority of the United States." §2241(c)(1). An individual is held "in custody" by the United States when the United States official charged with his detention has "the power to produce" him. *Wales* v. *Whitney*, 114 U. S. 564, 574 (1885); see also §2243 ("The writ . . . shall be directed to the person having custody of the person detained"). The disjunctive "or" in §2241(c)(1) makes clear that actual custody by the United States suffices for jurisdiction, even if that custody could be viewed as "under . . . color of" another authority, such as the MNF–I.

The Government's primary contention is that the District Courts lack jurisdiction in these cases because of this Court's decision in *Hirota*. That slip of a case cannot bear the weight the Government would place on it. In *Hirota*, Japanese citizens sought permission to file habeas corpus applications directly in this Court. The petitioners were noncitizens detained in Japan. They had been convicted and sentenced by the International Military Tribunal for the Far East—an international tribunal established by General Douglas MacArthur acting, as the Court put it, in his capac-

ity as "the agent of the Allied Powers." 338 U. S., at 198. Although those familiar with the history of the period would appreciate the possibility of confusion over who General MacArthur took orders from, the Court concluded that the sentencing tribunal was "not a tribunal of the United States." *Ibid.* The Court then held that, "[u]nder the foregoing circumstances," United States courts had "no power or authority to review, to affirm, set aside or annul the judgments and sentences" imposed by that tribunal. *Ibid.* Accordingly, the Court denied the petitioners leave to file their habeas corpus applications, without further legal analysis. *Ibid.*

The Government argues that the multinational character of the MNF–I, like the multinational character of the tribunal at issue in *Hirota*, means that it too is not a United States entity subject to habeas. Reply Brief for Federal Parties 5–7. In making this claim, the Government acknowledges that the MNF–I is subject to American authority, but contends that the same was true of the tribunal at issue in *Hirota*. In *Hirota*, the Government notes, the petitioners were held by the United States Eighth Army, which took orders from General MacArthur, 338 U. S., at 199 (Douglas, J., concurring), and were subject to an "unbroken" chain of U. S. command, ending with the President of the United States, *id.*, at 207.

The Court in *Hirota*, however, may have found it significant, in considering the nature of the tribunal established by General MacArthur, that the Solicitor General expressly contended that General MacArthur, as pertinent, was not subject to United States authority. The facts suggesting that the tribunal in *Hirota* was subject to an "unbroken" United States chain of command were not among the "foregoing circumstances" cited in the *per curiam* opinion disposing of the case, *id.*, at 198. They were highlighted only in Justice Douglas's belated opinion concurring in the result, published five months after that *per curiam*. *Id.*, at

199, n.*. Indeed, arguing before this Court, Solicitor General Perlman stated that General MacArthur did not serve "under the Joint Chiefs of Staff," that his duty was "to obey the directives of the Far Eastern Commission and not our War Department," and that "no process that could be issued from this court . . . would have any effect on his action." Tr. of Oral Arg. in *Hirota* v. *MacArthur*, O. T. 1948, No. 239, pp. 42, 50, 51. Here, in contrast, the Government acknowledges that our military commanders do answer to the President.

Even if the Government is correct that the international authority at issue in *Hirota* is no different from the international authority at issue here, the present "circumstances" differ in another respect. These cases concern American citizens while *Hirota* did not, and the Court has indicated that habeas jurisdiction can depend on citizenship. See *Johnson* v. *Eisentrager*, 339 U. S. 763, 781 (1950); *Rasul* v. *Bush*, 542 U. S. 466, 486 (2004) (KENNEDY, J., concurring in judgment). See also *Munaf*, 482 F. 3d, at 584 ("[W]e do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens"); *id.*, at 585 (Randolph, J., concurring in judgment).[3] "Under the foregoing circumstances," we decline to extend our holding in *Hirota* to preclude American citizens held overseas by American soldiers subject to a United States chain of command from filing habeas petitions.

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[3]The circumstances in *Hirota* differ in yet another respect. The petitioners in that case sought an original writ, filing their motions for leave to file habeas petitions "in this Court." 338 U. S., at 198. There is, however, some authority for the proposition that this Court has original subject-matter jurisdiction only over "'cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party,'" *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803) (quoting U. S. Const., Art. III, §2, cl. 2), and Congress had not granted the Court appellate jurisdiction to review decisions of the International Military Tribunal for the Far East.

III

We now turn to the question whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution. The nature of that question requires us to proceed "with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations." *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 383 (1959). Here there is the further consideration that those issues arise in the context of ongoing military operations conducted by American forces overseas. We therefore approach these questions cognizant that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of Navy* v. *Egan*, 484 U. S. 518, 530 (1988).

In *Omar*, the District Court granted and the D. C. Circuit upheld a preliminary injunction that, as interpreted by the Court of Appeals, prohibited the United States from (1) effectuating "Omar's transfer *in any form*, whether by an official handoff or otherwise," to Iraqi custody, 479 F. 3d, at 12; (2) sharing details concerning any decision to release Omar with the Iraqi Government, *id.*, at 13; and (3) "presenting Omar to the [Iraqi courts] for trial," *id.*, at 14. This is not a narrow injunction. Even the habeas petitioners do not defend it in its entirety. They acknowledge the authority of the Iraqi courts to begin criminal proceedings against Omar and wisely concede that any injunction "clearly need not include a bar on 'information-sharing.'" Brief for Habeas Petitioners 61. As Judge Brown noted in her dissent, such a bar would impermissibly "enjoin the United States military from sharing information with an allied foreign sovereign in a war zone." *Omar*, *supra*, at 18.

We begin with the basics. A preliminary injunction is an "extraordinary and drastic remedy," 11A C. Wright,

A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995) (hereinafter Wright & Miller) (footnotes omitted); it is never awarded as of right, *Yakus* v. *United States*, 321 U. S. 414, 440 (1944). Rather, a party seeking a preliminary injunction must demonstrate, among other things, "a likelihood of success on the merits." *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 428 (2006) (citing *Mazurek* v. *Armstrong*, 520 U. S. 968, 972 (1997) (*per curiam*); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975)). But one searches the opinions below in vain for any mention of a likelihood of success as to the merits of Omar's habeas petition. Instead, the District Court concluded that the "*jurisdictional* issues" presented questions "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." *Omar* v. *Harvey*, 416 F. Supp. 2d 19, 23–24, 27 (DC 2006) (internal quotation marks omitted; emphasis added).

The D. C. Circuit made the same mistake. In that court's view, the "only question before [it] at th[at] stage of the litigation relate[d] to the district court's jurisdiction." 479 F. 3d, at 11. As a result, the Court of Appeals held that it "need not address" the merits of Omar's habeas claims: Those merits had "no relevance." *Ibid.*

A difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction. It says nothing about the "likelihood of success on the merits," other than making such success more *unlikely* due to potential impediments to even reaching the merits. Indeed, if all a "likelihood of success on the merits" meant was that the district court likely had jurisdiction, then preliminary injunctions would be the rule, not the exception. In light of these basic principles, we hold that it was an abuse of discretion for the District Court to grant a preliminary injunction on the view that the "jurisdictional issues" in Omar's case were tough, with-

out even considering the merits of the underlying habeas petition.

What we have said thus far would require reversal and remand in each of these cases: The lower courts in *Munaf* erred in dismissing for want of jurisdiction, and the lower courts in *Omar* erred in issuing and upholding the preliminary injunction. There are occasions, however, when it is appropriate to proceed further and address the merits. This is one of them.

Our authority to address the merits of the habeas petitioners' claims is clear. Review of a preliminary injunction "is not confined to the act of granting the injunctio[n], but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of [the] bill, and, if so, to directing a final decree dismissing it." *City and County of Denver* v. *New York Trust Co.*, 229 U. S. 123, 136 (1913). See also *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 287 (1940) ("'If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated'" (quoting *Meccano, Ltd.* v. *John Wanamaker, N. Y.*, 253 U. S. 136, 141 (1920))). This has long been the rule: "By the ordinary practice in equity as administered in England and this country," a reviewing court has the power on appeal from an interlocutory order "to examine the merits of the case . . . and upon deciding them in favor of the defendant to dismiss the bill." *North Carolina R. Co.* v. *Story*, 268 U. S. 288, 292 (1925). Indeed, "[t]he question whether an action should be dismissed for failure to state a claim is one of the most common issues that may be reviewed on appeal from an interlocutory injunction order." 16 Wright & Miller, Jurisdiction and Related Matters §3921.1, p. 32 (2d ed. 1996).

Adjudication of the merits is most appropriate if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail. In such cases, the defendant is entitled to judgment. See, *e. g.*, *Deckert*, *supra*, at 287; *North*

Carolina R. Co., *supra*, at 292; *City and County of Denver*, *supra*, at 136.

Given that the present cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations, reaching the merits is the wisest course. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 584–585 (1952) (finding the case ripe for merits review on appeal from stay of preliminary injunction). For the reasons we explain below, the relief sought by the habeas petitioners makes clear under our precedents that the power of the writ ought not to be exercised. Because the Government is entitled to judgment as a matter of law, it is appropriate for us to terminate the litigation now.

IV

The habeas petitioners argue that the writ should be granted in their cases because they have "a legally enforceable right" not to be transferred to Iraqi authority for criminal proceedings under both the Due Process Clause and the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), div. G, 112 Stat. 2681–761, and because they are innocent civilians who have been unlawfully detained by the United States in violation of the Due Process Clause. Brief for Habeas Petitioners 48–52. With respect to the transfer claim, petitioners request an injunction prohibiting the United States from transferring them to Iraqi custody. With respect to the unlawful detention claim, petitioners seek "release"—but only to the extent that release would not result in "unlawful" transfer to Iraqi custody. Tr. of Oral Arg. 48. Both of these requests would interfere with Iraq's sovereign right to "punish offenses against its laws committed within its borders." *Wilson*, 354 U. S., at 529. We accordingly hold that the detainees' claims do not state grounds upon which habeas relief may be granted, that the habeas petitions should have been promptly dismissed, and that no injunction should have been entered.

A

Habeas corpus is "governed by equitable principles." *Fay* v. *Noia*, 372 U. S. 391, 438 (1963). We have therefore recognized that "prudential concerns," *Withrow* v. *Williams*, 507 U. S. 680, 686 (1993), such as comity and the orderly administration of criminal justice, may "require a federal court to forgo the exercise of its habeas corpus power," *Francis* v. *Henderson*, 425 U. S. 536, 539 (1976).

The principle that a habeas court is "not bound in every case" to issue the writ, *Ex parte Royall*, 117 U. S. 241, 251 (1886), follows from the precatory language of the habeas statute, and from its common-law origins. The habeas statute provides only that a writ of habeas corpus "*may* be granted," §2241(a) (emphasis added), and directs federal courts to "dispose of [habeas petitions] as law and justice require," §2243. See *Danforth* v. *Minnesota*, 552 U. S. 264, 278 (2008). Likewise, the writ did not issue in England "as of mere course," but rather required the petitioner to demonstrate why the "extraordinary power of the crown" should be exercised, 3 W. Blackstone, Commentaries on the Laws of England 132 (1768); even then, courts were directed to "do as to justice shall appertain," 1 *id.*, at 131 (1765). The question, therefore, even where a habeas court has the power to issue the writ, is "whether this be a case in which [that power] ought to be exercised." *Ex parte Watkins*, 3 Pet. 193, 201 (1830) (Marshall, C. J.).

At the outset, the nature of the relief sought by the habeas petitioners suggests that habeas is not appropriate in these cases. Habeas is at its core a remedy for unlawful executive detention. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). The typical remedy for such detention is, of course, release. See, *e. g.*, *Preiser* v. *Rodriguez*, 411 U. S. 475, 484 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody"). But here the last thing petitioners want is simple release; that would expose them to apprehension by Iraqi authorities for criminal prose-

cution—precisely what petitioners went to federal court to avoid. At the end of the day, what petitioners are really after is a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders.

The habeas petitioners do not dispute that they voluntarily traveled to Iraq, that they remain detained within the sovereign territory of Iraq today, or that they are alleged to have committed serious crimes in Iraq. Indeed, Omar and Munaf both concede that, if they were not in MNF–I custody, Iraq would be free to arrest and prosecute them under Iraqi law. See Tr. in *Omar*, No. 06–5126 (CADC), pp. 48–49, 59 (Sept. 11, 2006); Tr. in *Mohammad*, No. 06–1455 (DC), pp. 15–16 (Oct. 10, 2006). There is, moreover, no question that Munaf is the subject of ongoing Iraqi criminal proceedings and that Omar would be but for the present injunction. Munaf was convicted by the CCCI, and while that conviction was overturned on appeal, his case was remanded to and is again pending before the CCCI. The MNF–I referred Omar to the CCCI for prosecution at which point he sought and obtained an injunction that prohibits his prosecution. See 479 F. 3d, at 16, n. 3 (Brown, J., dissenting in part) ("'[Omar] has not yet had a trial or even an investigative hearing in the CCCI due to the district court's unprecedented injunction'" (citing Opposition to Petitioner's Emergency Motion for Injunctive Relief in *Munaf* v. *Harvey*, No. 06–5324 (CADC, Oct. 25, 2006), pp. 18–19)).

Given these facts, our cases make clear that Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil. As Chief Justice Marshall explained nearly two centuries ago, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136 (1812). See *Wilson*, *supra*, at 529 ("A sovereign nation has

exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction"); *Reid* v. *Covert*, 354 U. S. 1, 15, n. 29 (1957) (opinion of Black, J.) ("[A] foreign nation has plenary criminal jurisdiction . . . over all Americans . . . who commit offenses against its laws within its territory"); *Kinsella* v. *Krueger*, 351 U. S. 470, 479 (1956) (nations have a "sovereign right to try and punish [American citizens] for offenses committed within their borders," unless they "have relinquished [their] jurisdiction" to do so).

This is true with respect to American citizens who travel abroad and commit crimes in another nation whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution. "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Neely* v. *Henkel*, 180 U. S. 109, 123 (1901).

The habeas petitioners nonetheless argue that the Due Process Clause includes a "[f]reedom from unlawful transfer" that is "protected *wherever* the government seizes a citizen." Brief for Habeas Petitioners 48. We disagree. Not only have we long recognized the principle that a nation state reigns sovereign within its own territory, we have twice applied that principle to reject claims that the Constitution precludes the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial.

In *Wilson*, 354 U. S. 524, we reversed an injunction similar to the one at issue here. During a cavalry exercise at the Camp Weir range in Japan, Girard, a Specialist Third Class in the United States Army, caused the death of a Japanese woman. *Id.*, at 525–526. After Japan indicted Girard, but while he was still in United States custody, Girard filed a writ of habeas corpus in the United States District Court

for the District of Columbia. *Ibid.* The District Court granted a preliminary injunction against the United States, enjoining the "proposed delivery of [Girard] to the Japanese Government." *Girard* v. *Wilson*, 152 F. Supp. 21, 27 (1957). In the District Court's view, to permit the transfer to Japanese authority would violate the rights guaranteed to Girard by the Constitution. *Ibid.*

We granted certiorari, and vacated the injunction. 354 U. S., at 529–530. We noted that Japan had exclusive jurisdiction "to punish offenses against its laws committed within its borders," unless it had surrendered that jurisdiction. *Id.*, at 529. Consequently, even though Japan had ceded some of its jurisdiction to the United States pursuant to a bilateral Status of Forces Agreement, the United States could waive that jurisdiction—as it had done in Girard's case—and the habeas court was without authority to enjoin Girard's transfer to the Japanese authorities. *Id.*, at 529–530.

Likewise, in *Neely*, *supra*, this Court held that habeas corpus was not available to defeat the criminal jurisdiction of a foreign sovereign, even when application of that sovereign's law would allegedly violate the Constitution. Neely—the habeas petitioner and an American citizen—was accused of violating Cuban law in Cuba. *Id.*, at 112–113. He was arrested and detained in the United States. *Id.*, at 113. The United States indicated its intent to extradite him, and Neely filed suit seeking to block his extradition on the grounds that Cuban law did not provide the panoply of rights guaranteed him by the Constitution of the United States. *Id.*, at 122. We summarily rejected this claim: "The answer to this suggestion is that those [constitutional] provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." *Ibid.* Neely alleged no claim for which a "discharge on *habeas corpus*" could issue. *Id.*, at 125. Accordingly,

the United States was free to transfer him to Cuban custody for prosecution.

In the present cases, the habeas petitioners concede that Iraq has the sovereign authority to prosecute them for alleged violations of its law, yet nonetheless request an injunction prohibiting the United States from transferring them to Iraqi custody. But as the foregoing cases make clear, habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them.

Petitioners' "release" claim adds nothing to their "transfer" claim. That claim fails for the same reasons the transfer claim fails, given that the release petitioners seek is release in a form that would avoid transfer. See Tr. of Oral Arg. 47–48; App. 40 (coupling Munaf's claim for release with a request for order requiring the United States to bring him to a U. S. court); App. 123 (same with respect to Omar). Such "release" would impermissibly interfere with Iraq's "exclusive jurisdiction to punish offenses against its laws committed within its borders," *Wilson*, *supra*, at 529; the "release" petitioners seek is nothing less than an order commanding our forces to smuggle them out of Iraq. Indeed, the Court of Appeals in Omar's case took the extraordinary step of upholding an injunction that prohibited the Executive from releasing Omar—the quintessential habeas remedy—if the United States shared information about his release with its military ally, Iraq. 479 F. 3d, at 13. Habeas does not require the United States to keep an unsuspecting nation in the dark when it releases an alleged criminal insurgent within its borders.

Moreover, because Omar and Munaf are being held by United States Armed Forces at the behest of the Iraqi Government pending their prosecution in Iraqi courts, *Mohammed*, 456 F. Supp. 2d, at 117, release of *any* kind would interfere with the sovereign authority of Iraq "to punish offenses

against its laws committed within its borders," *Wilson*, *supra*, at 529. This point becomes clear given that the MNF–I, pursuant to its U. N. mandate, is authorized to "take all necessary measures to contribute to the maintenance of security and stability in Iraq," App. G to Pet. for Cert. in No. 07–394, at 74a, ¶ 10, and specifically to provide for the "internment [of individuals in Iraq] where this is necessary for imperative reasons of security," *id.*, at 86a.

While the Iraqi Government is ultimately "responsible for [the] arrest, detention and imprisonment" of individuals who violate its laws, S. C. Res. 1790, Annex I, ¶ 4, p. 6, U. N. Doc. S/RES/1790 (Dec. 18, 2007), the MNF–I maintains physical custody of individuals like Munaf and Omar while their cases are being heard by the CCCI, *Mohammed*, *supra*, at 117. Indeed, Munaf is currently held at Camp Cropper pursuant to the express order of the Iraqi courts. See *In re Hikmat*, No. 19/Pub. Comm'n/2007, at 5 (directing that Munaf "remain in custody pending the outcome" of further Iraqi proceedings). As that court order makes clear, MNF–I detention is an integral part of the Iraqi system of criminal justice. MNF–I forces augment the Iraqi Government's peacekeeping efforts by functioning, in essence, as its jailor. Any requirement that the MNF–I release a detainee would, in effect, impose a release order on the Iraqi Government.

The habeas petitioners acknowledge that *some* interference with a foreign criminal system is too much. They concede that "it is axiomatic that an American court does not provide collateral review of proceedings in a foreign tribunal." Brief for Habeas Petitioners 39 (citing *Republic of Austria* v. *Altmann*, 541 U. S. 677, 700 (2004)). We agree, but see no reason why habeas corpus should permit a prisoner detained within a foreign sovereign's territory to prevent a trial from going forward in the first place. It did not matter that the habeas petitioners in *Wilson* and *Neely* had not been convicted. 354 U. S., at 525–526; 180 U. S., at 112–113. Rather, "the same principles of comity and respect for

foreign sovereigns that preclude judicial scrutiny of foreign convictions necessarily render invalid attempts to shield citizens from foreign prosecution in order to preempt such nonreviewable adjudications." *Omar*, *supra*, at 17 (Brown, J., dissenting in part).

To allow United States courts to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy seems at least as great an intrusion as the plainly barred collateral review of foreign convictions. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 417–418 (1964) ("'To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations"'" (quoting *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 303–304 (1918); punctuation omitted)).[1]

There is of course even more at issue here: Neither *Neely* nor *Wilson* concerned individuals captured and detained within an ally's territory during ongoing hostilities involving our troops. *Neely* involved a charge of embezzlement; *Wilson* the peacetime actions of a serviceman. Yet in those cases we held that the Constitution allows the Executive to transfer American citizens to foreign authorities for criminal prosecution. It would be passing strange to hold that the Executive lacks that same authority where, as here, the detainees were captured by our Armed Forces for engaging in serious hostile acts against an ally in what the Government

[1] The habeas petitioners claim that the injunction only bars Omar's presentation to the Iraqi courts and that the CCCI trial can go forward in Omar's absence. The injunction is not so easily narrowed. It was entered on the theory that Omar might be "presented to the CCCI and in that same day, be tried, [and] convicted," thus depriving the United States district courts of jurisdiction. *Omar* v. *Harvey*, 416 F. Supp. 2d 19, 29 (DC 2006). Petitioners' interpretation makes no sense under that theory: If a conviction would deprive the habeas court of jurisdiction, a trial, with or without the defendant, could result in just such a jurisdiction-divesting order.

refers to as "an active theater of combat." Brief for Federal Parties 16.

Such a conclusion would implicate not only concerns about interfering with a sovereign's recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders, but also concerns about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad. Our constitutional framework "requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953). Those who commit crimes within a sovereign's territory may be transferred to that sovereign's government for prosecution; there is hardly an exception to that rule when the crime at issue is not embezzlement but unlawful insurgency directed against an ally during ongoing hostilities involving our troops.

B

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Petitioners contend that these general principles are trumped in their cases because their transfer to Iraqi custody is likely to result in torture. This allegation was raised in Munaf's petition for habeas, App. 39, ¶ 46, but not in Omar's. Such allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the Judiciary. See M. Bassiouni, International Extradition: United States Law and Practice 921 (2007) ("*Habeas corpus* has been held not to be a valid means of inquiry into the treatment the relator is anticipated to receive in the requesting state").

This conclusion is reflected in the cases already cited. Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the Judiciary, to assess

practices in foreign countries and to determine national policy in light of those assessments. Thus, the Court in *Neely* concluded that an American citizen who "commits a crime in a foreign country" "cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people," but went on to explain that this was true "unless a different mode be provided for by treaty stipulations between that country and the United States." 180 U. S., at 123. Diplomacy was the means of addressing the petitioner's concerns.

By the same token, while the Court in *Wilson* stated the general principle that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders," it recognized that this rule could be altered by diplomatic agreement in light of particular concerns—as it was in that case—and by a decision of the Executive to waive jurisdiction granted under that agreement—as it was in that case. 354 U. S., at 529. See also *Kinsella*, 351 U. S., at 479 (alteration of jurisdictional rule through "carefully drawn agreements"). This recognition that it is the political branches that bear responsibility for creating exceptions to the general rule is nothing new; as Chief Justice Marshall explained in the *Schooner Exchange*, "exemptions from territorial jurisdiction . . . must be derived from the consent of the sovereign of the territory" and are "rather questions of policy than of law, that they are for diplomatic, rather than legal discussion." 7 Cranch, at 143, 146. The present concerns are of the same nature as the loss of constitutional rights alleged in *Wilson* and *Neely*, and are governed by the same principles.[5]

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[5]The United States has in fact entered into treaties that provide procedural protections to American citizens tried in other nations. See, *e. g.*, North Atlantic Treaty: Status of Forces, June 19, 1951, 4 U. S. T. 1802, T. I. A. S. No. 2846, Art. VII, ¶9 (guaranteeing arrested members of the Armed Forces and their civilian dependents, *inter alia*, an attorney, an interpreter, and a prompt and speedy trial, as well as the right to confront

The Executive Branch may, of course, decline to surrender a detainee for many reasons, including humanitarian ones. Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway. Indeed, the Solicitor General states that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result. Brief for Federal Parties 47; Reply Brief for Federal Parties 23. In these cases the United States explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have "'generally met internationally accepted standards for basic prisoner needs.'" *Ibid.* The Solicitor General explains that such determinations are based on "the Executive's assessment of the foreign country's legal system and . . . the Executive['s] . . . ability to obtain foreign assurances it considers reliable." Brief for Federal Parties 47.

The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. See The Federalist No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"). In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is. As Judge Brown noted, "we need not assume the political branches are oblivious to these concerns. In-

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witnesses, obtain favorable witnesses, and communicate with a representative of the United States).

deed, the other branches possess significant diplomatic tools and leverage the judiciary lacks." 479 F. 3d, at 20, n. 6 (dissenting opinion).

Petitioners briefly argue that their claims of potential torture may not be readily dismissed on the basis of these principles because the FARR Act prohibits transfer when torture may result. Brief for Habeas Petitioners 51–52. Neither petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before this Court. Even in their merits brief in this Court, the habeas petitioners hardly discuss the issue. *Id.*, at 17, 51–52, 57–58. The Government treats the issue in kind. Reply Brief for Federal Parties 24–26. Under such circumstances we will not consider the question.[6]

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[6] We hold that these habeas petitions raise no claim for relief under the FARR Act and express no opinion on whether Munaf and Omar may be permitted to amend their respective pleadings to raise such a claim on remand. Even if considered on the merits, several issues under the FARR Act claim would have to be addressed. First, the Act speaks to situations where a detainee is being "return[ed]" to "a country." FARR Act §2242(a), 112 Stat. 2681–822 ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States"); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U. N. T. S. 85, Art. 3, 23 I. L. M. 1027, 1028 ("No State Party shall expel, return ('refouler') or extradite a person *to another State* where there are substantial grounds for believing that he would be in danger of being subjected to torture" (emphasis added)). It is not settled that the Act addresses the transfer of an individual located in Iraq to the Government of Iraq; arguably such an individual is not being "returned" to "a country"—he is already there.

Second, claims under the FARR Act may be limited to certain immigration proceedings. See §2242(d), 112 Stat. 2681–822 ("[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other

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Finally, the habeas petitioners raise the additional argument that the United States may not transfer a detainee to Iraqi custody, not because it would be unconstitutional to do so, but because the "[G]overnment may not transfer a citizen without legal authority." Brief for Habeas Petitioners 54. The United States, they claim, bears the burden of "identify-[ing] a treaty or statute that permits it to transfer the[m] to Iraqi custody." *Id.*, at 49.

The habeas petitioners rely prominently on *Valentine* v. *United States ex rel. Neidecker*, 299 U. S. 5 (1936), where we ruled that the Executive may not extradite a person held within the United States unless "legal authority" to do so "is given by act of Congress or by the terms of a treaty," *id.*, at 9. But *Valentine* is readily distinguishable. It involved the extradition of an individual from the United States; this is not an extradition case, but one involving the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory. In the extradition context, when a "'fugitive criminal'" is found within the United States, "'there is no authority vested in any department of the government to seize [him] and surrender him to a foreign power,'" in the absence of a pertinent constitutional or legislative provision. *Ibid.* But Omar and Munaf voluntarily traveled to Iraq and are being held there. They are therefore subject to the territorial jurisdiction of that sovereign, not of the United States. Moreover, as we have explained, petitioners are being held by the United States, acting as part of the MNF–I, at the request of and on behalf of the Iraqi Government. It would be more than odd if the Government had no authority to transfer them to the very sovereign on whose behalf, and within whose territory, they are being detained.

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determination made with respect to the application of the policy set forth in [this section], except as part of the review of a final order of removal pursuant to [8 U. S. C. § 1252 (2000 ed. and Supp. V)]").

The habeas petitioners further contend that this Court's decision in *Wilson* supports their argument that the Executive lacks the discretion to transfer a citizen absent a treaty or statute. Brief for Habeas Petitioners 54–55. Quite the opposite. *Wilson* forecloses it. The only "authority" at issue in *Wilson*—a Status of Forces Agreement—seemed to give the habeas petitioner in that case a right to be tried by an American military tribunal, not a Japanese court. 354 U. S., at 529. Nevertheless, in light of the background principle that Japan had a sovereign interest in prosecuting crimes committed within its borders, this Court found no "constitutional or statutory" impediment to the United States's waiver of its jurisdiction under the agreement. *Id.*, at 530.

* * *

Munaf and Omar are alleged to have committed hostile and warlike acts within the sovereign territory of Iraq during ongoing hostilities there. Pending their criminal prosecution for those offenses, Munaf and Omar are being held in Iraq by American forces operating pursuant to a U. N. mandate and at the request of the Iraqi Government. Petitioners concede that Iraq has a sovereign right to prosecute them for alleged violations of its law. Yet they went to federal court seeking an order that would allow them to defeat precisely that sovereign authority. Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them.

For all the reasons given above, petitioners state no claim in their habeas petitions for which relief can be granted, and those petitions should have been promptly dismissed. The judgments below and the injunction entered against the United States are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

The Court holds that "[u]nder circumstances such as those presented here, . . . habeas corpus provides petitioners with no relief." *Ante*, at 680. The Court's opinion makes clear that those circumstances include the following: (1) Omar and Munaf "voluntarily traveled to Iraq." *Ante*, at 694. They are being held (2) in the "territory" of (3) an "ally" of the United States, *ante*, at 700, (4) by our troops, see *ante*, at 685, (5) "during ongoing hostilities" that (6) "involv[e] our troops," *ante*, at 700. (7) The government of a foreign sovereign, Iraq, has decided to prosecute them "for crimes committed on its soil." *Ante*, at 694. And (8) "the State Department has determined that . . . the department that would have authority over Munaf and Omar . . . as well as its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs." *Ante*, at 702 (internal quotation marks omitted). Because I consider these circumstances essential to the Court's holding, I join its opinion.

The Court accordingly reserves judgment on an "extreme case in which the Executive has determined that a detainee [in United States custody] is likely to be tortured but decides to transfer him anyway." *Ibid.* I would add that nothing in today's opinion should be read as foreclosing relief for a citizen of the United States who resists transfer, say, from the American military to a foreign government for prosecution in a case of that sort, and I would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it. Although the Court rightly points out that any likelihood of extreme mistreatment at the receiving government's hands is a proper matter for the political branches to consider, see *ante*, at 700–701, if the political branches did favor transfer it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture.

And although the Court points out that habeas is aimed at securing release, not protective detention, see *ante*, at 693–694, habeas would not be the only avenue open to an objecting prisoner; "where federally protected rights [are threatened], it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell* v. *Hood*, 327 U. S. 678, 684 (1946).

Syllabus

IRIZARRY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06–7517. Argued April 15, 2008—Decided June 12, 2008

Petitioner pleaded guilty to making a threatening interstate communication to his ex-wife, in violation of federal law. Although the presentence report recommended a Federal Sentencing Guidelines range of 41-to-51 months in prison, the court imposed the statutory maximum sentence—60 months in prison and 3 years of supervised release—rejecting petitioner's objection that he was entitled to notice that the court was contemplating an upward departure. The Eleventh Circuit affirmed, reasoning that Federal Rule of Criminal Procedure 32(h), which states that "[b]efore the court may depart from the applicable sentencing range on a ground not identified . . . either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure," did not apply because the sentence was a variance, not a Guidelines departure.

Held: Rule 32(h) does not apply to a variance from a recommended Guidelines range. At the time that *Burns* v. *United States*, 501 U. S. 129, was decided, prompting Rule 32(h)'s promulgation, the Guidelines were mandatory; the Sentencing Reform Act of 1984 prohibited district courts from disregarding most of the Guidelines' "mechanical dictates," *id.*, at 133. Confronted with the constitutional problems that might otherwise arise, the *Burns* Court held that the Rule 32 provision allowing parties to comment on the appropriate sentence—now Rule 32(i)(1)(C)—would be "render[ed] meaningless" unless the defendant were given notice of a contemplated departure. *Id.*, at 135–136. Any constitutionally protected expectation that a defendant will receive a sentence within the presumptively applicable Guidelines range did not, however, survive *United States* v. *Booker*, 543 U. S. 220, which invalidated the Guidelines' mandatory features. Faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of "expectancy" that gave rise to a special need for notice in *Burns*. Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness. *Gall* v. *United States*, 552 U. S. 38, 51. Thus, the due process concerns motivating the Court to require notice in a mandatory Guidelines world no longer provide a basis for extending

the *Burns* rule either through an interpretation of Rule 32(h) itself or through Rule 32(i)(1)(C). Nor does the rule apply to 18 U. S. C. §3553 variances by its terms. Although the Guidelines, as the "starting point and the initial benchmark," continue to play a role in the sentencing determination, see *Gall*, 552 U. S., at 49, there is no longer a limit comparable to the one in *Burns* on variances from Guidelines ranges that a district court may find justified. This Court is confident that district judges and counsel have the ability—especially in light of Rule 32's other procedural protections—to make sure that all relevant matters relating to a sentencing decision have been considered before a final determination is made. Pp. 713–716.

458 F. 3d 1208, affirmed.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 717. BREYER, J., filed a dissenting opinion, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined, *post*, p. 717.

Arthur J. Madden III argued the cause for petitioner. With him on the briefs were *Walter Dellinger*, *Mark S. Davies*, and *Jonathan D. Hacker*.

Matthew D. Roberts argued the cause for the United States. With him on the brief were former *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Sangita K. Rao*.

Peter B. Rutledge, by invitation of the Court, 552 U. S. 1135, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. With him on the brief was *Douglas A. Berman*.

JUSTICE STEVENS delivered the opinion of the Court.

Rule 32(h) of the Federal Rules of Criminal Procedure, promulgated in response to our decision in *Burns* v. *United States*, 501 U. S. 129 (1991), states that "[b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating

such a departure." The question presented by this case is whether that Rule applies to every sentence that is a variance from the recommended Federal Sentencing Guidelines range even though not considered a "departure" as that term was used when Rule 32(h) was promulgated.

I

Petitioner, Richard Irizarry, pleaded guilty to one count of making a threatening interstate communication, in violation of 18 U. S. C. § 875(c). Petitioner made the following admissions in the factual resume accompanying his plea: (1) On November 5, 2003, he sent an e-mail threatening to kill his ex-wife and her new husband; (2) he had sent "dozens" of similar e-mails in violation of a restraining order; (3) he intended the e-mails to "convey true threats to kill or injure multiple persons"; and (4) at all times he acted knowingly and willfully. App. 273–275.

The presentence report (PSR), in addition to describing the threatening e-mails, reported that petitioner had asked another inmate to kill his ex-wife's new husband. Brief for United States 6. The PSR advised against an adjustment for acceptance of responsibility and recommended a Guidelines sentencing range of 41-to-51 months of imprisonment, based on enhancements for violating court protective orders, making multiple threats, and intending to carry out those threats. Brief for Petitioner 9. As possible grounds for a departure, the probation officer stated that petitioner's criminal history category might not adequately reflect his "'past criminal conduct or the likelihood that [petitioner] will commit other crimes.'" *Ibid.*

The Government made no objection to the PSR, but advised the court that it intended to call petitioner's ex-wife as a witness at the sentencing hearing. App. 293. Petitioner objected to the PSR's application of the enhancement based on his intention to carry out the threats and its rejection

of an adjustment for acceptance of responsibility. *Id.*, at 295–296.

Four witnesses testified at the sentencing hearing. *Id.*, at 299. Petitioner's ex-wife described incidents of domestic violence, the basis for the restraining order against petitioner, and the threats petitioner made against her and her family and friends. *Id.*, at 307, 309, 314. She emphasized at some length her genuine concern that petitioner fully intended to carry out his threats. *Id.*, at 320. A special agent of the Federal Bureau of Investigation was called to describe documents recovered from petitioner's vehicle when he was arrested; those documents indicated he intended to track down his ex-wife and their children. *Id.*, at 326–328. Petitioner's cellmate next testified that petitioner "was obsessed with the idea of getting rid of" his ex-wife's husband. *Id.*, at 336. Finally, petitioner testified at some length, stating that he accepted responsibility for the e-mails, but that he did not really intend to carry out his threats. *Id.*, at 361. Petitioner also denied speaking to his cellmate about killing his ex-wife's husband. *Id.*, at 356–357.

After hearing from counsel, the trial judge delivered a thoughtful oral decision, which included findings resolving certain disputed issues of fact. She found that petitioner had deliberately terrorized his ex-wife, that he intended to carry out one or more of his threats, "that he still intends to threaten and to terrorize Ms. Smith by whatever means he can and that he does not accept responsibility for what he has done." *Id.*, at 372. After giving both petitioner and counsel an opportunity to make further comment, the judge concluded:

> "I've considered all of the evidence presented today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline

> range is not appropriate in this case. I find Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.
>
> "The guideline range goes up to 51 months, which is only nine months shorter than the statutory maximum. But I think in Mr. Irizarry's case the statutory maximum is what's appropriate, and that's what I'm going to sentence him." *Id.*, at 374–375.

The court imposed a sentence of 60 months of imprisonment to be followed by a 3-year term of supervised release. *Id.*, at 375.

Defense counsel then raised the objection that presents the issue before us today. He stated, "We didn't have notice of [the court's] intent to upwardly depart. What the law is on that now with—," to which the Court responded, "I think the law on that is out the window. . . . You had notice that the guidelines were only advisory and the court could sentence anywhere within the statutory range." *Id.*, at 377.

The Court of Appeals for the Eleventh Circuit affirmed petitioner's sentence, reasoning that Rule 32(h) did not apply because "the above-guidelines sentence imposed by the district court in this case was a variance, not a guidelines departure." 458 F. 3d 1208, 1211 (2006) *(per curiam)*. The Court of Appeals declined to extend the rule to variances. "After [*United States* v. *Booker*, 543 U. S. 220 (2005)], parties are inherently on notice that the sentencing guidelines range is advisory . . . . Given *Booker*, parties cannot claim unfair surprise or inability to present informed comment." *Id.*, at 1212.

Because the Courts of Appeals are divided with respect to the applicability of Rule 32(h) to Guidelines variances,[1] we granted certiorari. 552 U. S. 1086 (2008). We now affirm.

II

At the time of our decision in *Burns*, the Guidelines were mandatory; the Sentencing Reform Act of 1984, § 211 *et seq.*, 98 Stat. 1987, prohibited district courts from disregarding "the mechanical dictates of the Guidelines" except in narrowly defined circumstances. 501 U. S., at 133. Confronted with the constitutional problems that might otherwise arise, we held that the provision of Rule 32 that allowed parties an opportunity to comment on the appropriate sentence—now Rule 32(i)(1)(C)—would be "render[ed] meaningless" unless the defendant were given notice of any contemplated departure. *Id.*, at 135–136. JUSTICE SOUTER disagreed with our conclusion with respect to the text of Rule 32 and conducted a due process analysis. *Id.*, at 147 (dissenting opinion).

Any expectation subject to due process protection at the time we decided *Burns* that a criminal defendant would receive a sentence within the presumptively applicable Guidelines range did not survive our decision in *United States* v. *Booker*, 543 U. S. 220 (2005), which invalidated the mandatory features of the Guidelines. Now faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of "expectancy"

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[1] Compare *United States* v. *Vega-Santiago*, 519 F. 3d 1 (CA1 2008) (en banc); *United States* v. *Vampire Nation*, 451 F. 3d 189 (CA3 2006); *United States* v. *Mejia-Huerta*, 480 F. 3d 713 (CA5 2007); *United States* v. *Long Soldier*, 431 F. 3d 1120 (CA8 2005); and *United States* v. *Walker*, 447 F. 3d 999, 1006 (CA7 2006), with *United States* v. *Anati*, 457 F. 3d 233 (CA2 2006); *United States* v. *Davenport*, 445 F. 3d 366 (CA4 2006); *United States* v. *Cousins*, 469 F. 3d 572 (CA6 2006); *United States* v. *Evans-Martinez*, 448 F. 3d 1163 (CA9 2006); and *United States* v. *Atencio*, 476 F. 3d 1099 (CA10 2007).

that gave rise to a special need for notice in *Burns*. Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness. *Gall* v. *United States*, 552 U. S. 38, 51 (2007); see also *Rita* v. *United States*, 551 U. S. 338 (2007).

It is, therefore, no longer the case that "were we to read Rule 32 to dispense with notice [of a contemplated non-Guidelines sentence], we would then have to confront the serious question whether [such] notice in this setting is mandated by the Due Process Clause." *Burns*, 501 U. S., at 138. The due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer provide a basis for this Court to extend the rule set forth in *Burns* either through an interpretation of Rule 32(h) itself or through Rule 32(i)(1)(C). And contrary to what the dissent argues, *post*, at 718 (opinion of BREYER, J.), the rule does not apply to 18 U. S. C. §3553 variances by its terms. "Departure" is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.

The notice requirement set out in *Burns* applied to a narrow category of cases. The only relevant departures were those authorized by 18 U. S. C. §3553(b) (1988 ed.), which required "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." That determination could only be made based on "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Ibid.* And the notice requirement only applied to the subcategory of those departures that were based on "a ground not identified as a ground for . . . departure either in the presentence report or in a prehearing submission." *Burns*, 501 U. S., at 138–139; see also Fed. Rule Crim. Proc. 32(h). Although the Guidelines, as the "starting point and the initial benchmark," continue to play a role in the sentencing determination, see

Gall, 552 U. S., at 49, there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U. S. C. §3553(a) (2000 ed. and Supp. V).

Rule 32(i)(1)(C) requires the district court to allow the parties to comment on "matters relating to an appropriate sentence," and given the scope of the issues that may be considered at a sentencing hearing, a judge will normally be well advised to withhold her final judgment until after the parties have had a full opportunity to present their evidence and their arguments. Sentencing is "a fluid and dynamic process and the court itself may not know until the end whether a variance will be adopted, let alone on what grounds." *United States* v. *Vega-Santiago*, 519 F. 3d 1, 4 (CA1 2008) (en banc). Adding a special notice requirement whenever a judge is contemplating a variance may create unnecessary delay; a judge who concludes during the sentencing hearing that a variance is appropriate may be forced to continue the hearing even where the content of the Rule 32(h) notice would not affect the parties' presentation of argument and evidence. In the case before us today, even if we assume that the judge had contemplated a variance before the sentencing hearing began, the record does not indicate that a statement announcing that possibility would have changed the parties' presentations in any material way; nor do we think it would in most cases. The Government admits as much in arguing that the error here was harmless. Brief for United States 37–38.

Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues. We recognize that there will be some cases in which the factual basis for a particular sentence will come as a surprise to a defendant or the Government. The

more appropriate response to such a problem is not to extend the reach of Rule 32(h)'s notice requirement categorically, but rather for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial. As Judge Boudin has noted:

> "In the normal case a competent lawyer . . . will anticipate most of what might occur at the sentencing hearing—based on the trial, the pre-sentence report, the exchanges of the parties concerning the report, and the preparation of mitigation evidence. Garden variety considerations of culpability, criminal history, likelihood of re-offense, seriousness of the crime, nature of the conduct and so forth should not generally come as a surprise to trial lawyers who have prepared for sentencing." *Vega-Santiago*, 519 F. 3d, at 5.

The fact that Rule 32(h) remains in effect today does not justify extending its protections to variances; the justification for our decision in *Burns* no longer exists, and such an extension is apt to complicate rather than to simplify sentencing procedures. We have confidence in the ability of district judges and counsel—especially in light of Rule 32's other procedural protections[2]—to make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[2] Rule 32 requires that a defendant be given a copy of his PSR at least 35 days before sentencing, Fed. Rule Crim. Proc. 32(e)(2). Further, each party has 14 days to object to the PSR, Rule 32(f)(1), and at least 7 days before sentencing the probation officer must submit a final version of the PSR to the parties, stating any unresolved objections, Rule 32(g). Finally, at sentencing, the parties must be allowed to comment on "matters relating to an appropriate sentence," Rule 32(i)(1)(C), and the defendant must be given an opportunity to speak and present mitigation testimony, Rule 32(i)(4)(A)(ii).

JUSTICE THOMAS, concurring.

Earlier this Term, I explained that because "there is no principled way to apply the *Booker* remedy," it is "best to apply the statute as written, including 18 U. S. C. §3553(b), which makes the [Federal Sentencing] Guidelines mandatory." *Kimbrough* v. *United States*, 552 U. S. 85, 116 (2007) (dissenting opinion) (referencing *United States* v. *Booker*, 543 U. S. 220, 258–265 (2005)); see also *Gall* v. *United States*, 552 U. S. 38, 61 (2007) (THOMAS, J., dissenting) (applying the Guidelines as mandatory). Consistent with that view, I would hold that the District Court committed statutory error when it imposed a sentence at "variance" with the Guidelines in a manner not authorized by the text of the Guidelines, which permit sentences outside the Guidelines, or "departures," only when certain aggravating or mitigating circumstances are present. See United States Sentencing Commission, Guidelines Manual §1B1.1 (Nov. 2007). But the issue whether such post-*Booker* "variances" are permissible is not currently before us.

Rather, we are presented with the narrow question whether Federal Rule of Criminal Procedure 32(h) requires a judge to give notice before he imposes a sentence outside the Guidelines on a ground not identified in the presentence report or in a prehearing submission by the Government. I agree with the Court that neither Rule 32(h) nor *Burns* v. *United States*, 501 U. S. 129 (1991), compels a judge to provide notice before imposing a sentence at "variance" with the post-*Booker* advisory Guidelines, *ante*, at 715. Each addresses only "departures" under the mandatory Guidelines and does not contemplate the drastic changes to federal sentencing wrought by the *Booker* remedy. For this reason, I join the Court's opinion.

JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

Federal Rule of Criminal Procedure 32(h) says:

> "Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure."

The question before us is whether this Rule applies when a sentencing judge decides, pursuant to 18 U. S. C. §3553(a) (2000 ed. and Supp. V), to impose a sentence that is a "variance" *from* the advisory Guidelines, but is not a "departure" *within* the Guidelines. The Court says that the Rule does not apply. I disagree.

The Court creates a legal distinction without much of a difference. The Rule speaks specifically of "departure[s]," but I see no reason why that term should not be read to encompass what the Court calls §3553(a) "variances." The Guidelines define "departure" to mean "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence." United States Sentencing Commission, Guidelines Manual §1B1.1, comment., n. 1(E) (Nov. 2007) (USSG). So-called variances fall comfortably within this definition. Variances are also consistent with the ordinary meaning of the term "departure." See, *e. g.*, Webster's Third New International Dictionary 604 (1993) (defining "departure" to mean a "deviation or divergence esp. from a rule" (def. 5a)). And conceptually speaking, the substantive difference between a "variance" and a "departure" is nonexistent, as this Court's opinions themselves make clear. See, *e. g.*, *Gall* v. *United States*, 552 U. S. 38, 46–47 (2007) (using the term "departure" to describe any non-Guideline sentence); *Rita* v. *United States*, 551 U. S. 338, 350 (2007) (stating that courts "may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence)").

Of course, when Rule 32(h) was written, its drafters had *only* Guidelines-authorized departures in mind: Rule 32(h) was written after the Guidelines took effect but before this

Court decided *United States* v. *Booker*, 543 U. S. 220 (2005). Yet the language of a statute or a rule, read in light of its purpose, often applies to circumstances that its authors did not then foresee. See, *e. g.*, *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79–80 (1998).

And here, the purpose behind Rule 32(h) requires that the Rule be construed to apply to variances. That Rule was added to "reflect" our decision in *Burns* v. *United States*, 501 U. S. 129 (1991). See Advisory Committee's Notes on Fed. Rule Crim. Proc. 32, 18 U. S. C. App., p. 1411 (2000 ed., Supp. II) (2002 Amendment). In *Burns*, the Court focused upon "the extraordinary case in which the district court, on its own initiative and contrary to the expectations of both the defendant and the Government, decides that the factual and legal predicates for a departure are satisfied." 501 U. S., at 135. The Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government . . . the district court [must] give the parties reasonable notice that it is contemplating such a ruling." *Id.*, at 138.

Our holding in *Burns* was motivated, in part, by a desire to avoid due process concerns. See *ibid.* ("[W]ere we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause"). That is perhaps why the majority today suggests that "[a]ny expectation subject to due process protection at the time we decided *Burns*" failed to survive *Booker*. *Ante*, at 713. But the due process concern was not the only reason for our holding in *Burns*, nor was it even the primary one. Rather, the Court principally based its decision upon Rule 32's requirement that parties be given "'an opportunity to comment upon . . . matters relating to the appropriate sentence.'" 501 U. S., at 135 (citing then-Rule 32(a)(1)). "Obviously," the Court said, whether a *sua sponte* departure was warranted was a "mat-

ter relating to the appropriate sentence." *Ibid.* (internal quotation marks omitted). To deprive the parties of notice of such a departure would thus "rende[r] meaningless" their right to comment on "matters relating to the appropriate sentence." *Id.*, at 136 (internal quotation marks omitted). Notice, the Court added, was "essential to assuring procedural fairness." *Id.*, at 138.

The Court's decision in *Burns* also relied on what the Court described as Rule 32's overall purpose of "provid[ing] for focused, adversarial development of the factual and legal issues" related to sentencing. *Id.*, at 134. This could be gleaned, *inter alia*, from the requirement that parties be given an opportunity to file responses or objections to the presentence report and from the requirement that parties be given an opportunity to speak at the sentencing proceeding. *Ibid.* Construing Rule 32 not to require notice of *sua sponte* departures, the Court reasoned, would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution" of sentencing issues. *Id.*, at 137.

The primary grounds for the Court's decision in *Burns* apply with equal force to the variances we consider here. Today, Rule 32(i)(1)(C) provides a virtually identical requirement that the district court "allow the parties' attorneys to comment on the probation officer's determinations *and other matters relating to an appropriate sentence*." (Emphasis added.) To deprive the parties of notice of previously unidentified grounds for a variance would *today* "rende[r] meaningless" the parties' right to comment on "matters relating to [an] appropriate sentence." *Id.*, at 136 (internal quotation marks omitted). To deprive the parties of notice would *today* subvert Rule 32's purpose of "promoting focused, adversarial resolution" of sentencing issues. In a word, it is not fair. *Id.*, at 137.

Seeking to overcome the fact that text, purpose, and precedent are not on its side, the majority makes two practical arguments in its defense. First, it says that notice is unnec-

essary because "there is no longer a limit comparable to the one at issue in *Burns*" as to the number of reasons why a district court might *sua sponte* impose a sentence outside the applicable range. *Ante*, at 715. Is that so? Courts, while now free to impose sentences that vary from a Guidelines-specified range, have *always* been free to depart from such a range. See USSG ch. 1, pt. A, § 4(b) (Nov. 1987), reprinted in § 1A1.1 comment., editorial note (Nov. 2007) (suggesting broad departure authority). Indeed, even *Burns* recognized that "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure." 501 U. S., at 136–137 (citing USSG ch. 1, pt. A, § 4(b) (1990)). Regardless, if *Booker* expanded the number of grounds on which a district court may impose a non-Guidelines sentence, that would seem to be an additional argument *in favor of*, not *against*, giving the parties notice of the district court's intention to impose a non-Guidelines sentence for some previously unidentified reason. Notice, after all, would promote "focused, adversarial" litigation at sentencing. *Burns*, *supra*, at 134, 137.

Second, the majority fears that a notice requirement would unnecessarily "delay" and "complicate" sentencing. *Ante*, at 715, 716. But this concern seems exaggerated. Rule 32(h) applies only where the court seeks to depart on a ground *not* previously identified by the presentence report or the parties' presentencing submissions. And the Solicitor General, after consulting with federal prosecutors, tells us that "in the vast majority of cases in which a district court imposes a sentence outside the Guidelines range, the grounds for the variance have previously been identified by the [presentence report] or the parties." Brief for United States 32.

In the remaining cases, notice does not necessarily mean delay. The parties may well be prepared to address the point and a meaningful continuance of sentencing would likely be in order only where a party would adduce additional evidence or brief an unconsidered legal issue. Further, to

the extent that district judges find a notice requirement to complicate sentencing, those judges could make use of Rule 32(d)(2)(F), which enables them to require that presentence reports address the sentence that would be appropriate in light of the §3553(a) factors (including, presumably, whether there exist grounds for imposing a non-Guidelines sentence). If a presentence report includes a section on whether a variance would be appropriate under §3553(a), that would likely eliminate the possibility that the district court would wind up imposing a non-Guidelines sentence for some reason *not previously identified*.

Finally, if notice *still* produced some burdens and delay, fairness justifies notice regardless. Indeed, the Government and the defendant here—the parties most directly affected by sentencing—both urge the Court to find a notice requirement. Clearly they recognize, as did the Court in *Burns*, that notice is "essential to assuring procedural fairness" at sentencing. 501 U. S., at 138.

I believe that Rule 32(h) provides this procedural safeguard. And I would vacate and remand to the Court of Appeals so that it could determine whether the petitioner received the required notice and, if not, act accordingly.

I respectfully dissent.

Syllabus

BOUMEDIENE ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06–1195. Argued December 5, 2007—Decided June 12, 2008*

In the Authorization for Use of Military Force (AUMF), Congress empowered the President "to use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks . . . on September 11, 2001." In *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 518, 588–589, five Justices recognized that detaining individuals captured while fighting against the United States in Afghanistan for the duration of that conflict was a fundamental and accepted incident to war. Thereafter, the Defense Department established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at the U. S. Naval Station at Guantanamo Bay, Cuba, were "enemy combatants."

Petitioners are aliens detained at Guantanamo after being captured in Afghanistan or elsewhere abroad and designated enemy combatants by CSRTs. Denying membership in the al Qaeda terrorist network that carried out the September 11 attacks and the Taliban regime that supported al Qaeda, each petitioner sought a writ of habeas corpus in the District Court, which ordered the cases dismissed for lack of jurisdiction because Guantanamo is outside sovereign U. S. territory. The D. C. Circuit affirmed, but this Court reversed, holding that 28 U. S. C. §2241 extended statutory habeas jurisdiction to Guantanamo. See *Rasul* v. *Bush*, 542 U. S. 466, 473. Petitioners' cases were then consolidated into two proceedings. In the first, the District Judge granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas action. In the second, the judge held that the detainees had due process rights.

While appeals were pending, Congress passed the Detainee Treatment Act of 2005 (DTA), §1005(e) of which amended 28 U. S. C. §2241 to provide that "no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo," and gave the D. C. Circuit "exclusive" jurisdiction to review CSRT decisions. In *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 576–577, the Court held this provision inapplicable to

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*Together with No. 06–1196, *Al Odah, Next Friend of Al Odah, et al.* v. *United States et al.*, also on certiorari to the same court.

Syllabus

cases (like petitioners') pending when the DTA was enacted. Congress responded with the Military Commissions Act of 2006 (MCA), § 7(a) of which amended § 2241(e)(1) to deny jurisdiction with respect to habeas actions by detained aliens determined to be enemy combatants, while § 2241(e)(2) denies jurisdiction as to "any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detained alien determined to be an enemy combatant. MCA § 7(b) provides that the § 2241(e) amendments "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained . . . since September 11, 2001."

The D. C. Circuit concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas applications; that petitioners are not entitled to habeas or the protections of the Suspension Clause, U. S. Const., Art. I, § 9, cl. 2, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"; and that it was therefore unnecessary to consider whether the DTA provided an adequate and effective substitute for habeas.

Held:

1. MCA § 7 denies the federal courts jurisdiction to hear habeas actions, like the instant cases, that were pending at the time of its enactment. Section 7(b)'s effective date provision undoubtedly applies to habeas actions, which, by definition, "relate to . . . detention" within that section's meaning. Petitioners argue to no avail that § 7(b) does not apply to a § 2241(e)(1) habeas action, but only to "any other action" under § 2241(e)(2), because it largely repeats that section's language. The phrase "other action" in § 2241(e)(2) cannot be understood without referring back to § 2241(e)(1), which explicitly mentions the "writ of habeas corpus." Because the two paragraphs' structure implies that habeas is a type of action "relating to any aspect of . . . detention," etc., pending habeas actions are in the category of cases subject to the statute's jurisdictional bar. This is confirmed by the MCA's legislative history. Thus, if MCA § 7 is valid, petitioners' cases must be dismissed. Pp. 736–739.

2. Petitioners have the constitutional privilege of habeas corpus. They are not barred from seeking the writ or invoking the Suspension Clause's protections because they have been designated as enemy combatants or because of their presence at Guantanamo. Pp. 739–771.

Syllabus

(a) A brief account of the writ's history and origins shows that protection for the habeas privilege was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights; in the system the Framers conceived, the writ has a centrality that must inform proper interpretation of the Suspension Clause. That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken in the Suspension Clause to specify the limited grounds for its suspension: The writ may be suspended only when public safety requires it in times of rebellion or invasion. The Clause is designed to protect against cyclical abuses of the writ by the Executive and Legislative Branches. It protects detainee rights by a means consistent with the Constitution's essential design, ensuring that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance." *Hamdi*, *supra*, at 536. Separation-of-powers principles, and the history that influenced their design, inform the Clause's reach and purpose. Pp. 739–746.

(b) A diligent search of founding-era precedents and legal commentaries reveals no certain conclusions. None of the cases the parties cite reveal whether a common-law court would have granted, or refused to hear for lack of jurisdiction, a habeas petition by a prisoner deemed an enemy combatant, under a standard like the Defense Department's in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control. The evidence as to the writ's geographic scope at common law is informative, but, again, not dispositive. Petitioners argue that the site of their detention is analogous to two territories outside England to which the common-law writ ran, the exempt jurisdictions and India, but critical differences between these places and Guantanamo render these claims unpersuasive. The Government argues that Guantanamo is more closely analogous to Scotland and Hanover, where the writ did not run, but it is unclear whether the common-law courts lacked the power to issue the writ there, or whether they refrained from doing so for prudential reasons. The parties' arguments that the very lack of a precedent on point supports their respective positions are premised upon the doubtful assumptions that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before the Court. Pp. 746–752.

(c) The Suspension Clause has full effect at Guantanamo. The Government's argument that the Clause affords petitioners no rights because the United States does not claim sovereignty over the naval station is rejected. Pp. 753–771.

Syllabus

(1) The Court does not question the Government's position that Cuba maintains sovereignty, in the legal and technical sense, over Guantanamo, but it does not accept the Government's premise that *de jure* sovereignty is the touchstone of habeas jurisdiction. Common-law habeas' history provides scant support for this proposition, and it is inconsistent with the Court's precedents and contrary to fundamental separation-of-powers principles. Pp. 753–755.

(2) Discussions of the Constitution's extraterritorial application in cases involving provisions other than the Suspension Clause undermine the Government's argument. Fundamental questions regarding the Constitution's geographic scope first arose when the Nation acquired Hawaii and the noncontiguous Territories ceded by Spain after the Spanish-American War, and Congress discontinued its prior practice of extending constitutional rights to territories by statute. In the so-called Insular Cases, the Court held that the Constitution had independent force in the Territories that was not contingent upon acts of legislative grace. See, *e. g.*, *Dorr* v. *United States*, 195 U. S. 138. Yet because of the difficulties and disruption inherent in transforming the former Spanish colonies' civil-law system into an Anglo-American system, the Court adopted the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories. See, *e. g.*, *id.*, at 143. Practical considerations likewise influenced the Court's analysis in *Reid* v. *Covert*, 354 U. S. 1, where, in applying the jury provisions of the Fifth and Sixth Amendments to American civilians being tried by the U. S. military abroad, both the plurality and the concurrences noted the relevance of practical considerations, related not to the petitioners' citizenship, but to the place of their confinement and trial. Finally, in holding that habeas jurisdiction did not extend to enemy aliens, convicted of violating the laws of war, who were detained in a German prison during the Allied Powers' post-World War II occupation, the Court, in *Johnson* v. *Eisentrager*, 339 U. S. 763, stressed the practical difficulties of ordering the production of the prisoners, *id.*, at 779. The Government's reading of *Eisentrager* as adopting a formalistic test for determining the Suspension Clause's reach is rejected because: (1) The discussion of practical considerations in that case was integral to a part of the Court's opinion that came before it announced its holding, see *id.*, at 781; (2) it mentioned the concept of territorial sovereignty only twice in its opinion, in contrast to its significant discussion of practical barriers to the running of the writ; and (3) if the Government's reading were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional approach. A constricted reading of *Eisentrager* overlooks

what the Court sees as a common thread uniting all these cases: the idea that extraterritoriality questions turn on objective factors and practical concerns, not formalism. Pp. 755–764.

(3) The Government's sovereignty-based test raises troubling separation-of-powers concerns, which are illustrated by Guantanamo's political history. Although the United States has maintained complete and uninterrupted control of Guantanamo for over 100 years, the Government's view is that the Constitution has no effect there, at least as to noncitizens, because the United States disclaimed formal sovereignty in its 1903 lease with Cuba. The Nation's basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say "what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177. These concerns have particular bearing upon the Suspension Clause question here, for the habeas writ is itself an indispensable mechanism for monitoring the separation of powers. Pp. 764–766.

(4) Based on *Eisentrager*, *supra*, at 777, and the Court's reasoning in its other extraterritoriality opinions, at least three factors are relevant in determining the Suspension Clause's reach: (1) the detainees' citizenship and status and the adequacy of the process through which that status was determined; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ. Application of this framework reveals, first, that petitioners' status is in dispute: They are not American citizens, but deny they are enemy combatants; and although they have been afforded some process in CSRT proceedings, there has been no *Eisentrager*–style trial by military commission for violations of the laws of war. Second, while the sites of petitioners' apprehension and detention weigh against finding they have Suspension Clause rights, there are critical differences between *Eisentrager*'s German prison, circa 1950, and the Guantanamo Naval Station in 2008, given the Government's absolute and indefinite control over the naval station. Third, although the Court is sensitive to the financial and administrative costs of holding the Suspension Clause applicable in a case of military detention abroad, these factors are not dispositive because the Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas courts had jurisdiction. The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. Pp. 766–771.

Syllabus

(d) Petitioners are therefore entitled to the habeas privilege, and if that privilege is to be denied them, Congress must act in accordance with the Suspension Clause's requirements. Cf. *Hamdi*, 542 U. S., at 564. P. 771.

3. Because the DTA's procedures for reviewing detainees' status are not an adequate and effective substitute for the habeas writ, MCA § 7 operates as an unconstitutional suspension of the writ. Pp. 771–792.

(a) Given its holding that the writ does not run to petitioners, the D. C. Circuit found it unnecessary to consider whether there was an adequate substitute for habeas. This Court usually remands for consideration of questions not decided below, but departure from this rule is appropriate in "exceptional" circumstances, see, *e. g.*, *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 169, here, the grave separation-of-powers issues raised by these cases and the fact that petitioners have been denied meaningful access to a judicial forum for years. Pp. 771–773.

(b) Historically, Congress has taken care to avoid suspensions of the writ. For example, the statutes at issue in the Court's two leading cases addressing habeas substitutes, *Swain* v. *Pressley*, 430 U. S. 372, and *United States* v. *Hayman*, 342 U. S. 205, were attempts to streamline habeas relief, not to cut it back. Those cases provide little guidance here because, *inter alia*, the statutes in question gave the courts broad remedial powers to secure the historic office of the writ, and included saving clauses to preserve habeas review as an avenue of last resort. In contrast, Congress intended the DTA and the MCA to circumscribe habeas review, as is evident from the unequivocal nature of MCA § 7's jurisdiction-stripping language, from the DTA's text limiting the Court of Appeals' jurisdiction to assessing whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense," DTA § 1005(e)(2)(C), and from the absence of a saving clause in either Act. That Congress intended to create a more limited procedure is also confirmed by the legislative history and by a comparison of the DTA and the habeas statute that would govern in MCA § 7's absence, 28 U. S. C. § 2241. In § 2241, Congress authorized "any justice" or "circuit judge" to issue the writ, thereby accommodating the necessity for fact-finding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court. See § 2241(b). However, by granting the D. C. Circuit "exclusive" jurisdiction over petitioners' cases, see DTA § 1005(e)(2)(A), Congress has foreclosed that option in these cases. Pp. 773–779.

(c) This Court does not endeavor to offer a comprehensive summary of the requisites for an adequate habeas substitute. It is uncontroversial, however, that the habeas privilege entitles the prisoner to a

meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law, *INS* v. *St. Cyr*, 533 U. S. 289, 302, and the habeas court must have the power to order the conditional release of an individual unlawfully detained. But more may be required depending on the circumstances. Petitioners identify what they see as myriad deficiencies in the CSRTs, the most relevant being the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. At the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case, does not have the assistance of counsel, and may not be aware of the most critical allegations that the Government relied upon to order his detention. His opportunity to confront witnesses is likely to be more theoretical than real, given that there are no limits on the admission of hearsay. The Court therefore agrees with petitioners that there is considerable risk of error in the tribunal's findings of fact. And given that the consequence of error may be detention for the duration of hostilities that may last a generation or more, the risk is too significant to ignore. Accordingly, for the habeas writ, or its substitute, to function as an effective and meaningful remedy in this context, the court conducting the collateral proceeding must have some ability to correct any errors, to assess the sufficiency of the Government's evidence, and to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. *In re Yamashita*, 327 U. S. 1, 5, 8, and *Ex parte Quirin*, 317 U. S. 1, 23–25, distinguished. Pp. 779–787.

(d) Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas. Among the constitutional infirmities from which the DTA potentially suffers are the absence of provisions allowing petitioners to challenge the President's authority under the AUMF to detain them indefinitely, to contest the CSRT's findings of fact, to supplement the record on review with exculpatory evidence discovered after the CSRT proceedings, and to request release. The statute cannot be read to contain each of these constitutionally required procedures. MCA §7 thus effects an unconstitutional suspension of the writ. There is no jurisdictional bar to the District Court's entertaining petitioners' claims. Pp. 787–792.

4. Nor are there prudential barriers to habeas review. Pp. 793–796.

(a) Petitioners need not seek review of their CSRT determinations in the D. C. Circuit before proceeding with their habeas actions in the District Court. If these cases involved detainees held for only a short time while awaiting their CSRT determinations, or were it probable that the Court of Appeals could complete a prompt review of their appli-

cations, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. But these qualifications no longer pertain here. In some instances six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. To require these detainees to pursue the limited structure of DTA review before proceeding with habeas actions would be to require additional months, if not years, of delay. This holding should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. Except in cases of undue delay, such as the present, federal courts should refrain from entertaining an enemy combatant's habeas petition at least until after the CSRT has had a chance to review his status. Pp. 793–795.

(b) In effectuating today's holding, certain accommodations—including channeling future cases to a single district court and requiring that court to use its discretion to accommodate to the greatest extent possible the Government's legitimate interest in protecting sources and intelligence gathering methods—should be made to reduce the burden habeas proceedings will place on the military, without impermissibly diluting the writ's protections. Pp. 795–796.

5. In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches. However, security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. Pp. 796–798.

476 F. 3d 981, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 798. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post*, p. 801. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 826.

Seth P. Waxman argued the cause for petitioners in both cases. With him on the briefs for petitioner Lakhdar Boumediene et al. in No. 06–1195 were *Paul R. Q. Wolfson*, *Jonathan G. Cedarbaum*, *Douglas F. Curtis*, *Paul M. Winke*, *Stephen H. Oleskey*, *Robert C. Kirsch*, *Mark C. Fleming*, and *Pratik A. Shah*. *David J. Cynamon*, *Matthew J. MacLean*,

Counsel

David H. Remes, and *Marc D. Falkoff* filed briefs for petitioner Khaled A. F. Al Odah et al. in No. 06–1196. *Thomas B. Wilner*, *Neil H. Koslowe*, *George Brent Mickum IV*, *John J. Gibbons*, *Lawrence S. Lustberg*, *Michael Ratner*, *J. Wells Dixon*, *Shayana Kadidal*, *Mark S. Sullivan*, *Pamela Rogers Chepiga*, *Joseph Margulies*, *Erwin Chemerinsky*, *Baher Azmy*, *Kristine Huskey*, *Douglas J. Behr*, and *Clive Stafford Smith* filed briefs for petitioner Jamil El-Banna et al. in No. 06–1196. *William C. Kuebler*, *Rebecca Snyder*, and *Walter Dellinger* filed a brief for Omar Khadr as respondent in No. 06–1196 under this Court's Rule 12.6 in support of petitioners.

Former *Solicitor General Clement* argued the cause for respondents in both cases. With him on the brief were *Acting Solicitor General Garre*, *Assistant Attorney General Keisler*, *Principal Deputy Associate Attorney General Katsas*, *Eric D. Miller*, *Douglas N. Letter*, *Robert M. Loeb*, *August E. Flentje*, *Pamela M. Stahl*, and *Jennifer Paisner*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Bar Association by *William H. Neukom* and *Sidney S. Rosdeitcher*; for the American Civil Liberties Union et al. by *Cecillia D. Wang*, *Lucas Guttentag*, *Steven R. Shapiro*, *Arthur H. Bryant*, and *Victoria W. Ni*; for the Association of the Bar of the City of New York by *Arthur F. Fergenson* and *David E. Nachman*; for Canadian Parliamentarians and Professors of Law by *William R. Stein* and *Scott H. Christensen*; for the Cato Institute by *Timothy Lynch*; for the Coalition of Non-Governmental Organizations by *Jonathan S. Franklin*, *Stephen M. McNabb*, *Sharon Bradford Franklin*, and *John W. Whitehead*; for the Federal Public Defender for the Southern District of Florida by *Paul M. Rashkind*; for Former Federal Judges by *Beth S. Brinkmann*, *Seth M. Galanter*, *Ketanji Brown Jackson*, and *Agnieszka M. Fryszman*; for Former United States Diplomat Diego C. Asencio et al. by *Douglass Cassel*; for International Humanitarian Law Experts by *Harrison J. Frahn IV* and *Beth Van Schaack*; for Professors of Constitutional Law and Federal Jurisdiction by *Margaret L. Sanner*, *Gerald L. Neuman*, *pro se*, and *Harold Hongju Koh*, *pro se*; for Retired Military Officers by *James C. Schroeder*, *Gary A. Isaac*, and *Philip Allen Lacovara*; for Specialists in Israeli Military Law and

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, §9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005

Constitutional Law by *Stephen J. Schulhofer*, *Charles T. Lester, Jr.*, *John A. Chandler*, and *Avital Stadler*; for the United Nations High Commissioner for Human Rights by *Donald Francis Donovan*, *Catherine M. Amirfar*, and *William H. Taft V*; for Salim Hamdan by *Neal K. Katyal*, *Harry H. Schneider, Jr.*, *Joseph M. McMillan*, *Laurence H. Tribe*, *Kevin K. Russell*, and *Charles Swift*; and for United States Senator Arlen Specter, by Sen. Specter, *pro se*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*; and for Retired Generals and Admirals et al. by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* were filed in both cases for 383 United Kingdom and European Parliamentarians by *Claude B. Stansbury*; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, and *Robert W. Ash*; for Amnesty International et al. by *Paul L. Hoffman* and *William J. Aceves*; for the Commonwealth Lawyers Association by *John Townsend Rich* and *Stephen J. Pollak*; for Federal Courts and International Law Professors by *David C. Vladeck*; for Legal Historians by *James Oldham*, *Michael J. Wishnie*, and *Jonathan Hafetz*; for the National Institute of Military Justice by *Jennifer S. Martinez*, *Ronald W. Meister*, *Stephen A. Saltzburg*, and *Arnon D. Siegel*; and for Scholar Paul Finkelman et al. by *David Overlock Stewart*.

Andrew G. McBride filed a brief for the Foundation for Defense of Democracies et al. as *amici curiae* urging affirmance in No. 06–1195.

Briefs of *amici curiae* were filed in No. 06–1196 for International Law Scholars by *Sarah H. Paoletti*; and for the Juvenile Law Center et al. by *Marsha L. Levick*.

(DTA), 119 Stat. 2739, that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U. S. C. § 2241(e), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

Under the Authorization for Use of Military Force (AUMF), § 2(a), 115 Stat. 224, note following 50 U. S. C. § 1541, the President is authorized "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.*, at 518 (plurality opinion of O'Connor, J.); *id.*, at 588–589 (THOMAS, J., dissenting). After *Hamdi*, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were "enemy combatants," as the Department defines that term. See App. to Pet. for Cert. in No. 06–1195, p. 81a. A later memorandum established procedures to implement the

CSRTs. See App. to Pet. for Cert. in No. 06–1196, p. 147. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in *Hamdi*. See Brief for Federal Respondents 10.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

The first actions commenced in February 2002. The District Court ordered the cases dismissed for lack of jurisdiction because the naval station is outside the sovereign territory of the United States. See *Rasul* v. *Bush*, 215 F. Supp. 2d 55 (2002). The Court of Appeals for the District of Columbia Circuit affirmed. See *Al Odah* v. *United States*, 321 F. 3d 1134, 1145 (2003). We granted certiorari and reversed, holding that 28 U. S. C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo. See *Rasul* v. *Bush*, 542 U. S. 466, 473 (2004). The constitutional issue presented in the instant cases was not reached in *Rasul*. *Id.*, at 476.

After *Rasul*, petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due

Process Clause of the Fifth Amendment. See *Khalid* v. *Bush*, 355 F. Supp. 2d 311, 314 (DC 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (DC 2005).

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of § 1005 of the DTA amended 28 U. S. C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." 119 Stat. 2742. Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have "exclusive" jurisdiction to review decisions of the CSRTs. *Ibid.*

In *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 576–577 (2006), the Court held this provision did not apply to cases (like petitioners') pending when the DTA was enacted. Congress responded by passing the MCA, 10 U. S. C. § 948a *et seq.*, which again amended § 2241. The text of the statutory amendment is discussed below. See Part II, *infra*. (Four Members of the *Hamdan* majority noted that "[n]othing prevent[ed] the President from returning to Congress to seek the authority he believes necessary." 548 U. S., at 636 (BREYER, J., concurring). The authority to which the concurring opinion referred was the authority to "create military commissions of the kind at issue" in the case. *Ibid.* Nothing in that opinion can be construed as an invitation for Congress to suspend the writ.)

Petitioners' cases were consolidated on appeal, and the parties filed supplemental briefs in light of our decision in *Hamdan*. The Court of Appeals' ruling, 476 F. 3d 981 (CADC 2007), is the subject of our present review and today's decision.

The Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas corpus applications, *id.*, at 987; that petitioners are not entitled to the privilege of the writ

or the protections of the Suspension Clause, *id.*, at 990–991; and, as a result, that it was unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA.

We granted certiorari. 551 U. S. 1160 (2007).

II

As a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

As amended by the terms of the MCA, 28 U. S. C. § 2241(e) now provides:

> "(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> "(2) Except as provided in [§§ 1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

Section 7(b) of the MCA provides the effective date for the amendment of § 2241(e). It states:

> "The amendment made by [MCA § 7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the

> date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." 120 Stat. 2636.

There is little doubt that the effective date provision applies to habeas corpus actions. Those actions, by definition, are cases "which relate to . . . detention." See Black's Law Dictionary 728 (8th ed. 2004) (defining habeas corpus as "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal"). Petitioners argue, nevertheless, that MCA § 7(b) is not a sufficiently clear statement of congressional intent to strip the federal courts of jurisdiction in pending cases. See *Ex parte Yerger*, 8 Wall. 85, 102–103 (1869). We disagree.

Their argument is as follows: Section 2241(e)(1) refers to "a writ of habeas corpus." The next paragraph, § 2241(e)(2), refers to "any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who . . . [has] been properly detained as an enemy combatant or is awaiting such determination." There are two separate paragraphs, the argument continues, so there must be two distinct classes of cases. And the effective date subsection, MCA § 7(b), it is said, refers only to the second class of cases, for it largely repeats the language of § 2241(e)(2) by referring to "cases . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States."

Petitioners' textual argument would have more force were it not for the phrase "other action" in § 2241(e)(2). The phrase cannot be understood without referring back to the paragraph that precedes it, § 2241(e)(1), which explicitly mentions the term "writ of habeas corpus." The structure of the two paragraphs implies that habeas actions are a type of action "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who

is or was detained . . . as an enemy combatant." Pending habeas actions, then, are in the category of cases subject to the statute's jurisdictional bar.

We acknowledge, moreover, the litigation history that prompted Congress to enact the MCA. In *Hamdan* the Court found it unnecessary to address the petitioner's Suspension Clause arguments but noted the relevance of the clear statement rule in deciding whether Congress intended to reach pending habeas corpus cases. See 548 U. S., at 575 (Congress should "not be presumed to have effected such denial [of habeas relief] absent an unmistakably clear statement to the contrary"). This interpretive rule facilitates a dialogue between Congress and the Court. Cf. *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 206 (1991); H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1209–1210 (W. Eskridge & P. Frickey eds. 1994). If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented. The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one; and the Judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question when required to do so in a proper case.

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, see 476 F. 3d, at 986, n. 2 (citing relevant floor statements);

and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i. e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i. e.*, their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

We begin with a brief account of the history and origins of the writ. Our account proceeds from two propositions. First, protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause. Second, to the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.

A

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the

abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Art. 39, in Sources of Our Liberties 17 (R. Perry & J. Cooper eds. 1959) ("No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land"). Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. 9 W. Holdsworth, A History of English Law 112 (1926) (hereinafter Holdsworth).

The development was painstaking, even by the centuries-long measures of English constitutional history. The writ was known and used in some form at least as early as the reign of Edward I. *Id.*, at 108–125. Yet at the outset it was used to protect not the rights of citizens but those of the King and his courts. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power. See J. Baker, An Introduction to English Legal History 38–39 (4th ed. 2002). Thus the writ, while it would become part of the foundation of liberty for the King's subjects, was in its earliest use a mechanism for securing compliance with the King's laws. See Halliday & White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 585 (2008) (hereinafter Halliday & White) (manuscript, at 11, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252 (all Internet materials as visited June 9, 2008, and available in Clerk of Court's case file) (noting that "conceptually the writ arose from a theory of power rather than a theory of liberty")). Over time it became clear that by issuing the

writ of habeas corpus common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner. See M. Hale, Prerogatives of the King 229 (D. Yale ed. 1976); 2 J. Story, Commentaries on the Constitution of the United States § 1341, p. 237 (3d ed. 1858) (noting that the writ ran "into all parts of the king's dominions; for it is said, that the king is entitled, at all times, to have an account, why the liberty of any of his subjects is restrained").

Even so, from an early date it was understood that the King, too, was subject to the law. As the writers said of Magna Carta, "it means this, that the king is and shall be below the law." 1 F. Pollock & F. Maitland, History of English Law 173 (2d ed. 1909); see also 2 Bracton On the Laws and Customs of England 33 (S. Thorne transl. 1968) ("The king must not be under man but under God and under the law, because law makes the king"). And, by the 1600's, the writ was deemed less an instrument of the King's power and more a restraint upon it. See Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace, 40 Cal. L. Rev. 335, 336 (1952) (noting that by this point the writ was "the appropriate process for checking illegal imprisonment by public officials").

Still, the writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, habeas relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them.

A notable example from this period was *Darnel's Case*, 3 How. St. Tr. 1 (K. B. 1627). The events giving rise to the case began when, in a display of the Stuart penchant for authoritarian excess, Charles I demanded that Darnel and at least four others lend him money. Upon their refusal, they were imprisoned. The prisoners sought a writ of habeas corpus; and the King filed a return in the form of a warrant signed by the Attorney General. *Ibid.* The court held this

was a sufficient answer and justified the subjects' continued imprisonment. *Id.*, at 59.

There was an immediate outcry of protest. The House of Commons promptly passed the Petition of Right, 3 Car. 1, ch. 1 (1627), 5 Statutes of the Realm 23, 24 (reprint 1963), which condemned executive "imprison[ment] without any cause" shown, and declared that "no freeman in any such manner as is before mencioned [shall] be imprisoned or deteined." Yet a full legislative response was long delayed. The King soon began to abuse his authority again, and Parliament was dissolved. See W. Hall & R. Albion, A History of England and the British Empire 328 (3d ed. 1953) (hereinafter Hall & Albion). When Parliament reconvened in 1640, it sought to secure access to the writ by statute. The Act of 1640, 16 Car. 1, ch. 10, 5 Statutes of the Realm, at 110, expressly authorized use of the writ to test the legality of commitment by command or warrant of the King or the Privy Council. Civil strife and the Interregnum soon followed, and not until 1679 did Parliament try once more to secure the writ, this time through the Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, *id.*, at 935. The Act, which later would be described by Blackstone as the "stable bulwark of our liberties," 1 W. Blackstone, Commentaries *137 (hereinafter Blackstone), established procedures for issuing the writ; and it was the model upon which the habeas statutes of the 13 American Colonies were based, see Collings, *supra*, at 338–339.

This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. See *Loving* v. *United States*, 517 U. S. 748, 756 (1996) (noting that "[e]ven before

the birth of this country, separation of powers was known to be a defense against tyranny"); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty"); *Clinton* v. *City of New York*, 524 U. S. 417, 450 (1998) (KENNEDY, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers"). Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, see *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886), protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles, see, *e. g.*, *INS* v. *Chadha*, 462 U. S. 919, 958–959 (1983).

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2; see Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1509, n. 329 (1987) ("[T]he non-suspension clause is the original Constitution's most explicit reference to remedies"). The word "privilege" was used, perhaps, to avoid mentioning some rights to the exclusion of others. (Indeed, the only mention of the term "right" in the Constitution, as ratified, is in its clause giving Congress the power to protect the rights of authors and inventors. See Art. I, § 8, cl. 8.)

Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme. In a critical exchange with Patrick Henry at the Virginia ratifying convention Edmund Randolph referred to the Suspension Clause as an "exception" to the "power given to Congress to regulate courts." See 3 Debates in the Several

State Conventions on the Adoption of the Federal Constitution 460–464 (J. Elliot 2d ed. 1876). A resolution passed by the New York ratifying convention made clear its understanding that the Clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention. See Resolution of the New York Ratifying Convention (July 26, 1788), in 1 *id.*, at 328 (noting the convention's understanding "[t]hat every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*"). Alexander Hamilton likewise explained that by providing the detainee a judicial forum to challenge detention, the writ preserves limited government. As he explained in The Federalist No. 84:

> "[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: 'To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.' And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls 'the BULWARK of the British Constitution.'" C. Rossiter ed., p. 512 (1961) (quoting 1 Blackstone *136, 4 *id.*, at *438).

Post-1789 habeas developments in England, though not bearing upon the Framers' intent, do verify their foresight. Those later events would underscore the need for structural barriers against arbitrary suspensions of the writ. Just as the writ had been vulnerable to executive and parliamentary encroachment on both sides of the Atlantic before the American Revolution, despite the Habeas Corpus Act of 1679, the writ was suspended with frequency in England during times of political unrest after 1789. Parliament suspended the writ for much of the period from 1792 to 1801, resulting in rampant arbitrary imprisonment. See Hall & Albion 550. Even as late as World War I, at least one prominent English jurist complained that the Defence of the Realm Act, 1914, 4 & 5 Geo. 5, ch. 29(1)(a), effectively had suspended the privilege of habeas corpus for any person suspected of "communicating with the enemy." See *King* v. *Halliday*, [1917] A. C. 260, 299 (Lord Shaw, dissenting); see generally A. Simpson, In the Highest Degree Odious: Detention Without Trial in Wartime Britain 6–7, 24–25 (1992).

In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty. See *Hamdi*, 542 U. S., at 536 (plurality opinion). The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody"); cf. *In re Jackson*, 15 Mich. 417, 439–440 (1867) (Cooley, J., concurring) ("The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and

served upon, not the person confined, but his jailer"). The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.

B

The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection. The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. See *INS* v. *St. Cyr*, 533 U. S. 289, 300–301 (2001). But the analysis may begin with precedents as of 1789, for the Court has said that "at the absolute minimum" the Clause protects the writ as it existed when the Constitution was drafted and ratified. *Id.*, at 301.

To support their arguments, the parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789—as have *amici* whose expertise in legal history the Court has relied upon in the past. See Brief for Legal Historians as *Amici Curiae;* see also *St. Cyr*, *supra*, at 302, n. 16. The Government argues the common-law writ ran only to those territories over which the Crown was sovereign. See Brief for Federal Respondents 27. Petitioners argue that jurisdiction followed the King's officers. See Brief for Petitioner Boumediene et al. 11. Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant,

under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief. See, *e. g.*, *Sommersett's Case*, 20 How. St. Tr. 1, 80–82 (1772) (ordering an African slave freed upon finding the custodian's return insufficient); see generally *Khera* v. *Secretary of State for the Home Dept.*, [1984] A. C. 74, 111 ("Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question"). We know as well that common-law courts entertained habeas petitions brought by enemy aliens detained in England—"entertained" at least in the sense that the courts held hearings to determine the threshold question of entitlement to the writ. See *Case of Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775 (C. P. 1779); *King* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); *Du Castro's Case*, Fort. 195, 92 Eng. Rep. 816 (K. B. 1697).

In *Schiever* and the *Spanish Sailors*' case, the courts denied relief to the petitioners. Whether the holdings in these cases were jurisdictional or based upon the courts' ruling that the petitioners were detained lawfully as prisoners of war is unclear. See *Spanish Sailors*, *supra*, at 1324, 96 Eng. Rep., at 776; *Schiever*, *supra*, at 766, 97 Eng. Rep., at 552. In *Du Castro's Case*, the court granted relief, but that case is not analogous to petitioners' because the prisoner there appears to have been detained in England. See Halliday & White 27, n. 72. To the extent these authorities suggest the common-law courts abstained altogether from matters involving prisoners of war, there was greater justification for doing so in the context of declared wars with other nation states. Judicial intervention might have complicated the military's ability to negotiate exchange of prisoners with the

enemy, a wartime practice well known to the Framers. See Resolution of Mar. 30, 1778, 10 Journals of the Continental Congress 1774–1789, p. 295 (W. Ford ed. 1908) (directing General Washington not to exchange prisoners with the British unless the enemy agreed to exempt citizens from capture).

We find the evidence as to the geographic scope of the writ at common law informative, but, again, not dispositive. Petitioners argue the site of their detention is analogous to two territories outside of England to which the writ did run: the so-called "exempt jurisdictions," like the Channel Islands; and (in former times) India. There are critical differences between these places and Guantanamo, however.

As the Court noted in *Rasul*, 542 U. S., at 481–482, and nn. 11–12, common-law courts granted habeas corpus relief to prisoners detained in the exempt jurisdictions. But these areas, while not in theory part of the realm of England, were nonetheless under the Crown's control. See 2 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II, pp. 232–233 (reprint 1989). And there is some indication that these jurisdictions were considered sovereign territory. *King* v. *Cowle*, 2 Burr. 834, 854, 855, 856, 97 Eng. Rep. 587, 599 (K. B. 1759) (describing one of the exempt jurisdictions, Berwick-upon-Tweed, as under the "sovereign jurisdiction" and "subjection of the Crown of England"). Because the United States does not maintain formal sovereignty over Guantanamo Bay, see Part IV, *infra*, the naval station there and the exempt jurisdictions discussed in the English authorities are not similarly situated.

Petitioners and their *amici* further rely on cases in which British courts in India granted writs of habeas corpus to noncitizens detained in territory over which the Moghul Emperor retained formal sovereignty and control. See Brief for Petitioner Boumediene et al. 12–13; Brief for Legal Historians as *Amici Curiae* 12–13. The analogy to the present cases breaks down, however, because of the geographic loca-

tion of the courts in the Indian example. The Supreme Court of Judicature (the British Court) sat in Calcutta; but no federal court sits at Guantanamo. The Supreme Court of Judicature was, moreover, a special court set up by Parliament to monitor certain conduct during the British Raj. See Regulating Act of 1773, 13 Geo. 3, ch. 63, §§ 13–14. That it had the power to issue the writ in nonsovereign territory does not prove that common-law courts sitting in England had the same power. If petitioners were to have the better of the argument on this point, we would need some demonstration of a consistent practice of common-law courts sitting in England and entertaining petitions brought by alien prisoners detained abroad. We find little support for this conclusion.

The Government argues, in turn, that Guantanamo is more closely analogous to Scotland and Hanover, territories that were not part of England but nonetheless controlled by the English monarch (in his separate capacities as King of Scotland and Elector of Hanover). See *Cowle*, 2 Burr., at 856, 97 Eng. Rep., at 600. Lord Mansfield can be cited for the proposition that, at the time of the founding, English courts lacked the "power" to issue the writ to Scotland and Hanover, territories Lord Mansfield referred to as "foreign." *Ibid.* But what matters for our purposes is why common-law courts lacked this power. Given the English Crown's delicate and complicated relationships with Scotland and Hanover in the 1700's, we cannot disregard the possibility that the common-law courts' refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns. This appears to have been the case with regard to other British territories where the writ did not run. See 2 R. Chambers, A Course of Lectures on English Law 1767–1773, p. 8 (T. Curley ed. 1986) (discussing the view of Lord Mansfield in *Cowle* that "[n]otwithstanding the *power* which the judges have, yet where they cannot judge of the cause, or give relief

upon it, they would not think *proper* to interpose; and therefore in the case of imprisonments in *Guernsey, Jersey, Minorca*, or the *plantations*, the most usual way is to complain to the *king in Council*" (internal quotation marks omitted)). And after the Act of Union in 1707, through which the kingdoms of England and Scotland were merged politically, Queen Anne and her successors, in their new capacity as sovereign of Great Britain, ruled the entire island as one kingdom. Accordingly, by the time Lord Mansfield penned his opinion in *Cowle* in 1759, Scotland was no longer a "foreign" country vis-à-vis England—at least not in the sense in which Cuba is a foreign country vis-à-vis the United States.

Scotland remained "foreign" in Lord Mansfield's day in at least one important respect, however. Even after the Act of Union, Scotland (like Hanover) continued to maintain its own laws and court system. See 1 Blackstone *98, *106. Under these circumstances prudential considerations would have weighed heavily when courts sitting in England received habeas petitions from Scotland or the Electorate. Common-law decisions withholding the writ from prisoners detained in these places easily could be explained as efforts to avoid either or both of two embarrassments: conflict with the judgments of another court of competent jurisdiction; or the practical inability, by reason of distance, of the English courts to enforce their judgments outside their territorial jurisdiction. Cf. *Munaf* v. *Geren*, *ante*, at 693 (opinion of the Court) (recognizing that "'prudential concerns' . . . such as comity and the orderly administration of criminal justice" affect the appropriate exercise of habeas jurisdiction).

By the mid-19th century, British courts could issue the writ to Canada, notwithstanding the fact that Canadian courts also had the power to do so. See 9 Holdsworth 124, and n. 6 (citing *Ex parte Anderson*, 3 El. and El. 487, 121 Eng. Rep. 525 (K. B. 1861)). This might be seen as evidence that the existence of a separate court system was no barrier to the running of the common-law writ. The Canada of the

1800's, however, was in many respects more analogous to the exempt jurisdictions or to Ireland, where the writ ran, than to Scotland or Hanover in the 1700's, where it did not. Unlike Scotland and Hanover, Canada followed English law. See B. Laskin, The British Tradition in Canadian Law 50–51 (1969).

In the end a categorical or formal conception of sovereignty does not provide a comprehensive or altogether satisfactory explanation for the general understanding that prevailed when Lord Mansfield considered issuance of the writ outside England. In 1759 the writ did not run to Scotland but did run to Ireland, even though, at that point, Scotland and England had merged under the rule of a single sovereign, whereas the Crowns of Great Britain and Ireland remained separate (at least in theory). See *Cowle*, *supra*, at 856–857, 97 Eng. Rep., at 600; 1 Blackstone *100–*101. But there was at least one major difference between Scotland's and Ireland's relationship with England during this period that might explain why the writ ran to Ireland but not to Scotland. English law did not generally apply in Scotland (even after the Act of Union), but it did apply in Ireland. Blackstone put it as follows: "[A]s Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws." *Id.*, at *100 (footnote omitted). This distinction, and not formal notions of sovereignty, may well explain why the writ did not run to Scotland (and Hanover) but would run to Ireland.

The prudential barriers that may have prevented the English courts from issuing the writ to Scotland and Hanover are not relevant here. We have no reason to believe an order from a federal court would be disobeyed at Guantanamo. No Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the naval station. The modern-day rela-

tions between the United States and Guantanamo thus differ in important respects from the 18th-century relations between England and the kingdoms of Scotland and Hanover. This is reason enough for us to discount the relevance of the Government's analogy.

Each side in the present matter argues that the very lack of a precedent on point supports its position. The Government points out there is no evidence that a court sitting in England granted habeas relief to an enemy alien detained abroad; petitioners respond there is no evidence that a court refused to do so for lack of jurisdiction.

Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. See Halliday & White 14–15 (noting that most reports of 18th-century habeas proceedings were not printed). And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point. Cf. *Brown* v. *Board of Education*, 347 U. S. 483, 489 (1954) (noting evidence concerning the circumstances surrounding the adoption of the Fourteenth Amendment, discussed in the parties' briefs and uncovered through the Court's own investigation, "convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive"); *Reid* v. *Covert*, 354 U. S. 1, 64 (1957) (Frankfurter, J., concurring in result) (arguing constitutional adjudication should not be based upon evidence that is "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution").

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. See DTA § 1005(g), 119 Stat. 2743. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement); *Rasul*, 542 U. S., at 471. Under the terms of the 1934 treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base. See Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. See, *e. g.*, Brief for Petitioners in *Sale* v. *Haitian Centers Council, Inc.*, O. T. 1992, No. 92–344, p. 31 (arguing that Guantanamo is territory "*outside* the United States"). And in other contexts the Court has held that questions of sovereignty are for the political branches to decide. See *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380 (1948) ("[D]etermination of sovereignty over an area is for the legislative and executive departments"); see also *Jones* v. *United States*, 137 U. S. 202 (1890); *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420 (1839). Even if this were a treaty interpretation case that did not involve a political question, the President's construction of the lease agreement would be entitled to great respect. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982).

We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. As commentators have noted, "'[s]overeignty' is a term used in many senses and is much abused." See 1 Restatement (Third) of Foreign Relations Law of the United States § 206, Comment *b*, p. 94 (1986). When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power, see Webster's New International Dictionary 2406 (2d ed. 1934) ("sovereignty," definition 3), but sovereignty in the narrow, legal sense of the term, meaning a claim of right, see 1 Restatement (Third) of Foreign Relations, *supra*, § 206, Comment *b*, at 94 (noting that sovereignty "implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there"). Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War. See, *e. g.*, *Fleming* v. *Page*, 9 How. 603, 614 (1850) (noting that the port of Tampico, conquered by the United States during the war with Mexico, was "undoubtedly . . . subject to the sovereignty and dominion of the United States," but that it "does not follow that it was a part of the United States, or that it ceased to be a foreign country"); *King* v. *Earl of Crewe ex parte Sekgome*, [1910] 2 K. B. 576, 603–604 (C. A.) (opinion of Williams, L. J.) (arguing that the Bechuanaland Protectorate in South Africa was "under His Majesty's dominion in the sense of power and jurisdiction, but is not under his dominion in the sense of territorial dominion"). Accordingly,

for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory. See 542 U. S., at 480; *id.*, at 487 (KENNEDY, J., concurring in judgment).

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends.

The Framers foresaw that the United States would expand and acquire new territories. See *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 542 (1828). Article IV, §3, cl. 1, grants Congress the power to admit new States. Clause 2 of the same section grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Save for a few notable (and notorious) exceptions, *e. g.*, *Dred Scott* v. *Sandford*, 19 How. 393 (1857), throughout most of our history there was little need to explore the outer boundaries of the Constitution's geographic reach. When Congress exercised its power to create new territories, it

guaranteed constitutional protections to the inhabitants by statute. See, *e. g.*, An Act: to establish a Territorial Government for Utah, § 17, 9 Stat. 458 ("[T]he Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah"); Rev. Stat. § 1891 ("The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States"); see generally Burnett, *Untied* States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 825–827 (2005). In particular, there was no need to test the limits of the Suspension Clause because, as early as 1789, Congress extended the writ to the Territories. See Act of Aug. 7, 1789, 1 Stat. 52 (reaffirming Art. II of Northwest Ordinance of 1787, which provided that "[t]he inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus").

Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines—ceded to the United States by Spain at the conclusion of the Spanish-American War—and Hawaii—annexed by the United States in 1898. At this point Congress chose to discontinue its previous practice of extending constitutional rights to the Territories by statute. See, *e. g.*, An Act Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes, 32 Stat. 692 (noting that Rev. Stat. § 1891 did not apply to the Philippines).

In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. See *De Lima* v. *Bidwell*, 182 U. S. 1 (1901); *Dooley* v. *United States*, 182 U. S. 222 (1901); *Armstrong* v. *United States*, 182 U. S. 243 (1901); *Downes* v. *Bidwell*, 182 U. S. 244 (1901); *Hawaii*

v. *Mankichi*, 190 U. S. 197 (1903); *Dorr* v. *United States*, 195 U. S. 138 (1904). The Court held that the Constitution has independent force in these Territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position.

Prior to their cession to the United States, the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries. At least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory. See An Act To declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands (Jones Act), 39 Stat. 545 (noting that "it was never the intention of the people of the United States in the incipiency of the War with Spain to make it a war of conquest or for territorial aggrandizement" and that "it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein"). The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories. See *Downes*, *supra*, at 282 ("It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production . . . ").

These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories. See *Dorr*, *supra*, at 143 ("Until Congress shall see fit to incorporate territory

ceded by treaty into the United States, . . . the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation"); *Downes*, *supra*, at 293 (White, J., concurring) ("[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States"). As the Court later made clear, "the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." *Balzac* v. *Porto Rico*, 258 U. S. 298, 312 (1922). It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance. Cf. *Torres* v. *Puerto Rico*, 442 U. S. 465, 475–476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's"). But, as early as *Balzac* in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants "guaranties of certain fundamental personal rights declared in the Constitution." 258 U. S., at 312; see also *Late Corp. of Church of Jesus Christ of Latter-day Saints* v. *United States*, 136 U. S. 1, 44 (1890) ("Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments"). Yet

noting the inherent practical difficulties of enforcing all constitutional provisions "always and everywhere," *Balzac*, *supra*, at 312, the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter.

Practical considerations likewise influenced the Court's analysis a half century later in *Reid*, 354 U. S. 1. The petitioners there, spouses of American servicemen, lived on American military bases in England and Japan. They were charged with crimes committed in those countries and tried before military courts, consistent with executive agreements the United States had entered into with the British and Japanese Governments. *Id.*, at 15–16, and nn. 29–30 (plurality opinion). Because the petitioners were not themselves military personnel, they argued they were entitled to trial by jury.

Justice Black, writing for the plurality, contrasted the cases before him with the Insular Cases, which involved territories "with wholly dissimilar traditions and institutions" that Congress intended to govern only "temporarily." *Id.*, at 14. Justice Frankfurter argued that the "specific circumstances of each particular case" are relevant in determining the geographic scope of the Constitution. *Id.*, at 54 (opinion concurring in result). And Justice Harlan, who had joined an opinion reaching the opposite result in the case in the previous Term, *Reid* v. *Covert*, 351 U. S. 487 (1956), was most explicit in rejecting a "rigid and abstract rule" for determining where constitutional guarantees extend. *Reid*, 354 U. S., at 74 (opinion concurring in result). He read the Insular Cases to teach that whether a constitutional provision has extraterritorial effect depends upon the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" and, in particular, whether judicial enforcement of the provision would be "impracticable and anomalous." *Id.*, at 74–75; see also *United*

States v. *Verdugo-Urquidez*, 494 U. S. 259, 277–278 (1990) (KENNEDY, J., concurring) (applying the "impracticable and anomalous" extraterritoriality test in the Fourth Amendment context).

That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners' citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid* majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court's disposition) these considerations were the decisive factors in the case.

Indeed the majority splintered on this very point. The key disagreement between the plurality and the concurring Justices in *Reid* was over the continued precedential value of the Court's previous opinion in *In re Ross*, 140 U. S. 453 (1891), which the *Reid* Court understood as holding that under some circumstances Americans abroad have no right to indictment and trial by jury. The petitioner in *Ross* was a sailor serving on an American merchant vessel in Japanese waters who was tried before an American consular tribunal for the murder of a fellow crewman. 140 U. S., at 459, 479. The *Ross* Court held that the petitioner, who was a British subject, had no rights under the Fifth and Sixth Amendments. *Id.*, at 464. The petitioner's citizenship played no role in the disposition of the case, however. The Court assumed (consistent with the maritime custom of the time) that Ross had all the rights of a similarly situated American citizen. *Id.*, at 479 (noting that Ross was "under the protection and subject to the laws of the United States equally with the seaman who was native born"). The Justices in *Reid* therefore properly understood *Ross* as standing for the proposition that, at least in some circumstances, the jury provisions of the Fifth and Sixth Amendments have no application

to American citizens tried by American authorities abroad. See 354 U. S., at 11–12 (plurality opinion) (describing *Ross* as holding that "constitutional protections applied 'only to citizens and others within the United States . . . and not to residents or temporary sojourners abroad' " (quoting *Ross*, *supra*, at 464)); 354 U. S., at 64 (Frankfurter, J., concurring in result) (noting that the consular tribunals upheld in *Ross* "w[ere] based on long-established custom and they were justified as the best possible means for securing justice for the few Americans present in [foreign] countries"); 354 U. S., at 75 (Harlan, J., concurring in result) ("[W]hat *Ross* and the *Insular Cases* hold is that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas").

The *Reid* plurality doubted that *Ross* was rightly decided, precisely because it believed the opinion was insufficiently protective of the rights of American citizens. See 354 U. S., at 10–12; see also *id.*, at 78 (Clark, J., dissenting) (noting that "four of my brothers would specifically overrule and two would impair the long-recognized vitality of an old and respected precedent in our law, the case of *In re Ross*, 140 U. S. 453 (1891)"). But Justices Harlan and Frankfurter, while willing to hold that the American citizen petitioners in the cases before them were entitled to the protections of Fifth and Sixth Amendments, were unwilling to overturn *Ross*. 354 U. S., at 64 (Frankfurter, J., concurring in result); *id.*, at 75 (Harlan, J., concurring in result). Instead, the two concurring Justices distinguished *Ross* from the cases before them, not on the basis of the citizenship of the petitioners, but on practical considerations that made jury trial a more feasible option for them than it was for the petitioner in *Ross*. If citizenship had been the only relevant factor in the case, it would have been necessary for the Court to overturn

Ross, something Justices Harlan and Frankfurter were unwilling to do. See *Verdugo-Urquidez*, *supra*, at 277 (KENNEDY, J., concurring) (noting that *Ross* had not been overruled).

Practical considerations weighed heavily as well in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' post-War occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time. *Id.*, at 779. In considering these factors the Court sought to balance the constraints of military occupation with constitutional necessities. *Id.*, at 769–779; see *Rasul*, 542 U. S., at 475–476 (discussing the factors relevant to *Eisentrager*'s constitutional holding); 542 U. S., at 486 (KENNEDY, J., concurring in judgment) (same).

True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U. S., at 778. The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. See Brief for Federal Respondents 18–20. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta. The Court's fur-

ther determinations, based on practical considerations, were integral to Part II of its opinion and came before the decision announced its holding. See 339 U. S., at 781.

Second, because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, see *infra*, at 768, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. See *supra*, at 751–752. The Justices who decided *Eisentrager* would have understood sovereignty as a multifaceted concept. See Black's Law Dictionary 1568 (4th ed. 1951) (defining "sovereignty" as "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed"; "the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation"; and "[t]he power to do everything in a state without accountability"); Ballentine's Law Dictionary With Pronunciations 1216 (2d ed. 1948) (defining "sovereignty" as "[t]hat public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution"). In its principal brief in *Eisentrager*, the Government advocated a bright-line test for determining the scope of the writ, similar to the one it advocates in these cases. See Brief for Petitioners in *Johnson* v. *Eisentrager*, O. T. 1949, No. 306, pp. 74–75. Yet the Court mentioned the concept of territorial sovereignty only twice in its opinion. See *Eisentrager*, *supra*, at 778, 780. That the Court devoted a significant portion of Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it. Even if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive

factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the Insular Cases and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid:* the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

B

The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100 years. At the close of the Spanish-American War, Spain ceded control over the entire island of Cuba to the United States and specifically "relinquishe[d] all claim[s] of sovereignty . . . and title." See Treaty of Paris, Dec. 10, 1898, U. S.-Spain, Art. I, 30 Stat. 1755, T. S. No. 343. From the date the treaty with Spain was signed until the Cuban Republic was established on May 20, 1902, the United States governed the territory "in trust" for the benefit of the Cuban people. *Neely* v. *Henkel*, 180

U. S. 109, 120 (1901); H. Thomas, Cuba or The Pursuit of Freedom 436, 460 (1998). And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Murphy* v. *Ramsey*, 114 U. S. 15, 44 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for deter-

mining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

C

As we recognized in *Rasul*, 542 U. S., at 476; *id.*, at 487 (KENNEDY, J., concurring in judgment), the outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*. In addition to the practical concerns discussed above, the *Eisentrager* Court found relevant that each petitioner:

> "(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U. S., at 777.

Based on this language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. Petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." *Ibid.* In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process

in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, *supra*, at 766, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. See 14 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 8–10 (1949) (reprint 1997). To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses. See Memorandum by Command of Lt. Gen. Wedemeyer, Jan. 21, 1946 (establishing "Regulations Governing the Trial of War Criminals" in the China Theater), in Tr. of Record in *Johnson* v. *Eisentrager*, O. T. 1949, No. 306, pp. 34–40.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a "Personal Representative" to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his "advocate." See App. to Pet. for Cert. in No. 06–1196, at 155, ¶F(1), 172. The Government's evidence is accorded a presumption of validity. *Id.*, at 159. The detainee is allowed to present "reasonably available" evidence, *id.*, at 155, ¶F(1), but his ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings. See Part V, *infra*.

As to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, June 5, 1945, U. S.-U. S. S. R.-U. K.-Fr., 60 Stat. 1649, T. I. A. S. No. 1520. The United States was therefore answerable to its Allies for all activities occurring there. Cf. *Hirota* v. *MacArthur*, 338 U. S. 197, 198 (1948) *(per curiam)* (military tribunal set up by Gen. Douglas MacArthur, acting as "the agent of the Allied Powers," was not a "tribunal of the United States"). The Allies had not planned a long-term occupation of Germany, nor did they intend to displace all German institutions even during the period of occupation. See Agreements Respecting Basic Principles for Merger of the Three Western German Zones of Occupation, and Other Matters, Apr. 8, 1949, U. S.-U. K.-Fr., Art. 1, 63 Stat. 2819, T. I. A. S. No. 2066 (establishing a governing framework "[d]uring the period in which it is necessary that the occupation continue" and expressing the desire "that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation"). The Court's holding in *Eisentrager* was thus consistent with the Insular Cases, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no tran-

sient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States. See *Rasul*, 542 U. S., at 480; *id.*, at 487 (KENNEDY, J., concurring in judgment).

As to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned alongside each other at various points in our history. See, *e. g.*, *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946); *Ex parte Milligan*, 4 Wall. 2 (1866). The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.

The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. When hostilities in the European Theater came to an end, the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. See Letter from President Truman to Secretary of State Byrnes (Nov. 28, 1945), in 8 Documents on American Foreign Relations 257 (R. Dennett & R. Turner eds. 1948); Pollock, A Territorial Pattern for the Military Occupation of Germany, 38 Am. Pol. Sci. Rev. 970, 975 (1944). In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the

Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerrilla fighters, and 'werewolves.'" 339 U. S., at 784.

Similar threats are not apparent here; nor does the Government argue that they are. The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at various points, to house migrants and refugees temporarily. At present, however, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. See History of Guantanamo Bay, online at https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistgeneral. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight. See *Reid*, 354 U. S., at 74 (Harlan, J., concurring in result). Under the facts presented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them. See Part VI–B, *infra*.

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us

lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. See Oxford Companion to American Military History 849 (1999). The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. Cf. *Hamdi*, 542 U. S., at 564 (SCALIA, J., dissenting) ("[I]ndefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ"). This Court may not impose a *de facto* suspension by abstaining from these controversies. See *Hamdan*, 548 U. S., at 585, n. 16 ("[A]bstention is not appropriate in cases . . . in which the legal challenge 'turn[s] on the status of the persons as to whom the military asserted its power'" (quoting *Schlesinger* v. *Councilman*, 420 U. S. 738, 759 (1975))). The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the

Court of Appeals, see DTA § 1005(e), provides an adequate substitute. Congress has granted that court jurisdiction to consider

> "(i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C), 119 Stat. 2742.

The Court of Appeals, having decided that the writ does not run to the detainees in any event, found it unnecessary to consider whether an adequate substitute has been provided. In the ordinary course we would remand to the Court of Appeals to consider this question in the first instance. See *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) *(per curiam)*. It is well settled, however, that the Court's practice of declining to address issues left unresolved in earlier proceedings is not an inflexible rule. *Ibid.* Departure from the rule is appropriate in "exceptional" circumstances. See *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 169 (2004); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927).

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional. The parties before us have addressed the adequacy issue. While we would have found it informative to consider the reasoning of the Court of Appeals on this point, we must weigh that against the harms petitioners may endure from additional delay. And, given there are few precedents addressing what features an adequate substitute for habeas corpus must contain, in all

likelihood a remand simply would delay ultimate resolution of the issue by this Court.

We do have the benefit of the Court of Appeals' construction of key provisions of the DTA. When we granted certiorari in these cases, we noted "it would be of material assistance to consult any decision" in the parallel DTA review proceedings pending in the Court of Appeals, specifically any rulings in the matter of *Bismullah* v. *Gates*. 551 U. S. 1160 (2007). Although the Court of Appeals has yet to complete a DTA review proceeding, the three-judge panel in *Bismullah* has issued an interim order giving guidance as to what evidence can be made part of the record on review and what access the detainees can have to counsel and to classified information. See 501 F. 3d 178 (CADC) *(Bismullah I)*, reh'g denied, 503 F. 3d 137 (CADC 2007) *(Bismullah II)*. In that matter the full court denied the Government's motion for rehearing en banc, see *Bismullah* v. *Gates*, 514 F. 3d 1291 (CADC 2008) *(Bismullah III)*. The order denying rehearing was accompanied by five separate statements from members of the court, which offer differing views as to the scope of the judicial review Congress intended these detainees to have. *Ibid.*

Under the circumstances we believe the costs of further delay substantially outweigh any benefits of remanding to the Court of Appeals to consider the issue it did not address in these cases.

A

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims. See,

e. g., Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (current version codified at 28 U. S. C. § 2241 (2000 ed. and Supp. V) (extending the federal writ to state prisoners)); Cf. *Harris* v. *Nelson*, 394 U. S. 286, 299–300 (1969) (interpreting the All Writs Act, 28 U. S. C. § 1651, to allow discovery in habeas corpus proceedings); *Peyton* v. *Rowe*, 391 U. S. 54, 64–65 (1968) (interpreting the then-existing version of § 2241 to allow petitioner to proceed with his habeas corpus action, even though he had not yet begun to serve his sentence).

There are exceptions, of course. Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 106, 110 Stat. 1220, contains certain gatekeeping provisions that restrict a prisoner's ability to bring new and repetitive claims in "second or successive" habeas corpus actions. We upheld these provisions against a Suspension Clause challenge in *Felker* v. *Turpin*, 518 U. S. 651, 662–664 (1996). The provisions at issue in *Felker*, however, did not constitute a substantial departure from common-law habeas procedures. The provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine. *Id.*, at 664; see also *McCleskey* v. *Zant*, 499 U. S. 467, 489 (1991). AEDPA applies, moreover, to federal, postconviction review after criminal proceedings in state court have taken place. As of this point, cases discussing the implementation of that statute give little helpful instruction (save perhaps by contrast) for the instant cases, where no trial has been held.

The two leading cases addressing habeas substitutes, *Swain* v. *Pressley*, 430 U. S. 372 (1977), and *United States* v. *Hayman*, 342 U. S. 205 (1952), likewise provide little guidance here. The statutes at issue were attempts to streamline habeas corpus relief, not to cut it back.

The statute discussed in *Hayman* was 28 U. S. C. § 2255. It replaced traditional habeas corpus for federal prisoners (at least in the first instance) with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was, *inter alia*, " 'imposed in viola-

tion of the Constitution or laws of the United States.'" 342 U. S., at 207, n. 1. The purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient. It directed claims not to the court that had territorial jurisdiction over the place of the petitioner's confinement but to the sentencing court, a court already familiar with the facts of the case. As the *Hayman* Court explained:

> "Section 2255 . . . was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *Id.*, at 219.

See also *Hill* v. *United States*, 368 U. S. 424, 427, 428, and n. 5 (1962) (noting that § 2255 provides a remedy in the sentencing court that is "exactly commensurate" with the pre-existing federal habeas corpus remedy).

The statute in *Swain*, D. C. Code Ann. § 23–110(g) (1973), applied to prisoners in custody under sentence of the Superior Court of the District of Columbia. Before enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (D. C. Court Reform Act), 84 Stat. 473, those prisoners could file habeas petitions in the United States District Court for the District of Columbia. The Act, which was patterned on § 2255, substituted a new collateral process in the Superior Court for the pre-existing habeas corpus procedure in the District Court. See *Swain*, 430 U. S., at 374–378. But, again, the purpose and effect of the statute was to expedite consideration of the prisoner's claims, not to delay or frustrate it. See *id.*, at 375, n. 4 (not-

ing that the purpose of the D. C. Court Reform Act was to "alleviate" administrative burdens on the District Court).

That the statutes in *Hayman* and *Swain* were designed to strengthen, rather than dilute, the writ's protections was evident, furthermore, from this significant fact: Neither statute eliminated traditional habeas corpus relief. In both cases the statute at issue had a saving clause, providing that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective. *Swain*, *supra*, at 381; *Hayman*, *supra*, at 223. The Court placed explicit reliance upon these provisions in upholding the statutes against constitutional challenges. See *Swain*, *supra*, at 381 (noting that the provision "avoid[ed] any serious question about the constitutionality of the statute"); *Hayman*, *supra*, at 223 (noting that, because habeas remained available as a last resort, it was unnecessary to "reach constitutional questions").

Unlike in *Hayman* and *Swain*, here we confront statutes, the DTA and the MCA, that were intended to circumscribe habeas review. Congress' purpose is evident not only from the unequivocal nature of MCA §7's jurisdiction-stripping language, 28 U. S. C. §2241(e)(1) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus . . . "), but also from a comparison of the DTA to the statutes at issue in *Hayman* and *Swain*. When interpreting a statute, we examine related provisions in other parts of the U. S. Code. See, *e. g.*, *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 88–97 (1991); *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 717–718 (1995) (SCALIA, J., dissenting); see generally W. Eskridge, P. Frickey, & E. Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 1039 (3d ed. 2001). When Congress has intended to replace traditional habeas corpus with habeas-like substitutes, as was the case in *Hayman* and *Swain*, it has granted to the courts broad remedial powers to secure the historic office of the writ. In the §2255

context, for example, Congress has granted to the reviewing court power to "determine the issues and make findings of fact and conclusions of law" with respect to whether "the judgment [of conviction] was rendered without jurisdiction, or . . . the sentence imposed was not authorized by law or otherwise open to collateral attack." 28 U. S. C. § 2255(b) (2006 ed., Supp. II). The D. C. Court Reform Act, the statute upheld in *Swain*, contained a similar provision. § 23–110(g), 84 Stat. 609.

In contrast the DTA's jurisdictional grant is quite limited. The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense" and whether those standards and procedures are lawful. DTA § 1005(e)(2)(C), 119 Stat. 2742. If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner. Instead, it would have used language similar to what it used in the statutes at issue in *Hayman* and *Swain*. Cf. *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'" (quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972) *(per curiam)*)). Unlike in *Hayman* and *Swain*, moreover, there has been no effort to preserve habeas corpus review as an avenue of last resort. No saving clause exists in either the MCA or the DTA. And MCA § 7 eliminates habeas review for these petitioners.

The differences between the DTA and the habeas statute that would govern in MCA § 7's absence, 28 U. S. C. § 2241 (2000 ed. and Supp. V), are likewise telling. In § 2241 (2000 ed.) Congress confirmed the authority of "any justice" or "circuit judge" to issue the writ. Cf. *Felker*, 518 U. S., at 660–661 (interpreting Title I of AEDPA to not strip from

this Court the power to entertain original habeas corpus petitions). That statute accommodates the necessity for fact-finding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for fact-finding is superior to his or her own. See 28 U. S. C. §2241(b). By granting the Court of Appeals "exclusive" jurisdiction over petitioners' cases, see DTA §1005(e)(2)(A), 119 Stat. 2742, Congress has foreclosed that option. This choice indicates Congress intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings. The DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one, but, if congressional intent is to be respected, the procedures adopted cannot be as extensive or as protective of the rights of the detainees as they would be in a §2241 proceeding. Otherwise there would have been no, or very little, purpose for enacting the DTA.

To the extent any doubt remains about Congress' intent, the legislative history confirms what the plain text strongly suggests: In passing the DTA Congress did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure. See, *e. g.*, 151 Cong. Rec. S14263 (Dec. 21, 2005) (statement of Sen. Graham) (noting that the DTA "extinguish[es] these habeas and other actions in order to effect a transfer of jurisdiction over these cases to the DC Circuit Court"); *ibid.* (statement of Sen. Kyl) (agreeing that the bill "create[s] in their place a very limited judicial review of certain military administrative decisions"); *id.*, at S14268 (same) ("It is important to note that the limited judicial review authorized by paragraphs 2 and 3 of subsection (e) [of DTA §1005] are not habeas-corpus review. It is a limited judicial review of its own nature").

It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus. The present cases thus test the limits of the Suspension Clause in ways that *Hayman* and *Swain* did not.

B

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. *St. Cyr*, 533 U. S., at 302. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. See *Ex parte Bollman*, 4 Cranch 75, 136 (1807) (where imprisonment is unlawful, the court "can only direct [the prisoner] to be discharged"); R. Hurd, Treatise on the Right of Personal Liberty, and On the Writ of Habeas Corpus and the Practice Connected With It: With a View of the Law of Extradition of Fugitives 222 (2d ed. 1876) ("It cannot be denied where 'a probable ground is shown that the party is imprisoned without just cause, and therefore, hath a right to be delivered,' for the writ then becomes a 'writ of right, which may not be denied but ought to be granted to every man that is committed or detained in prison or otherwise restrained of his liberty' "). But see *Chessman* v. *Teets*, 354 U. S. 156, 165–166 (1957) (remanding in a habeas case for retrial within a "reasonable time"). These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. See 3 Black-

stone *131 (describing habeas as "the great and efficacious writ, in all manner of illegal confinement"); see also *Schlup* v. *Delo*, 513 U. S. 298, 319 (1995) (Habeas "is, at its core, an equitable remedy"); *Jones* v. *Cunningham*, 371 U. S. 236, 243 (1963) (Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). It appears the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention. Notably, the black-letter rule that prisoners could not controvert facts in the jailer's return was not followed (or at least not with consistency) in such cases. Hurd, *supra*, at 271 (noting that the general rule was "subject to exceptions" including cases of bail and impressment); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 457 (1966) ("[W]hen a prisoner applied for habeas corpus before indictment or trial, some courts examined the written depositions on which he had been arrested or committed, and others even heard oral testimony to determine whether the evidence was sufficient to justify holding him for trial" (footnotes omitted)); Fallon & Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 Harv. L. Rev. 2029, 2102 (2007) ("[T]he early practice was not consistent: courts occasionally permitted factual inquiries when no other opportunity for judicial review existed").

There is evidence from 19th-century American sources indicating that, even in States that accorded strong res judicata effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner. See, *e. g.*, *Ex parte Pattison*, 56 Miss. 161, 164 (1878) (noting that "[w]hile the former adjudication must be considered as conclusive on the testimony then adduced" "newly developed exculpatory evidence . . . may authorize the admission to bail"); *Ex parte Foster*, 5 Tex. Ct. App. 625,

644 (1879) (construing the State's habeas statute to allow for the introduction of new evidence "where important testimony has been obtained, which, though not newly discovered, or which, though known to [the petitioner], it was not in his power to produce at the former hearing; [and] where the evidence was newly discovered"); *People* v. *Martin*, 7 N. Y. Leg. Obs. 49, 56 (1848) ("If in custody on criminal process before indictment, the prisoner has an absolute right to demand that the original depositions be looked into to see whether any crime is in fact imputed to him, and the inquiry will by no means be confined to the return. Facts out of the return may be gone into to ascertain whether the committing magistrate may not have arrived at an illogical conclusion upon the evidence given before him . . . "); see generally W. Church, Treatise on the Writ of Habeas Corpus § 182, p. 235 1886) (hereinafter Church) (noting that habeas courts would "hear evidence anew if justice require it"). Justice McLean, on Circuit in 1855, expressed his view that a habeas court should consider a prior judgment conclusive "where there was clearly jurisdiction and a full and fair hearing; but that it might not be so considered when any of these requisites were wanting." *Ex parte Robinson*, 20 F. Cas. 969, 971, (No. 11,935) (CC Ohio). To illustrate the circumstances in which the prior adjudication did not bind the habeas court, he gave the example of a case in which "[s]everal unimpeached witnesses" provided new evidence to exculpate the prisoner. *Ibid.*

The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976) (noting that the Due Process Clause requires an assessment of, *inter alia*, "the risk of an erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards"). This principle has an established foundation in habeas corpus jurisprudence as

well, as Chief Justice Marshall's opinion in *Ex parte Watkins*, 3 Pet. 193 (1830), demonstrates. Like the petitioner in *Swain*, Watkins sought a writ of habeas corpus after being imprisoned pursuant to a judgment of a District of Columbia court. In holding that the judgment stood on "high ground," 3 Pet., at 209, the Chief Justice emphasized the character of the court that rendered the original judgment, noting it was a "court of record, having general jurisdiction over criminal cases." *Id.*, at 203. In contrast to "inferior" tribunals of limited jurisdiction, *ibid.*, courts of record had broad remedial powers, which gave the habeas court greater confidence in the judgment's validity. See generally Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 982–983 (1998).

Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as was the case in *Watkins* and indeed in most federal habeas cases, considerable deference is owed to the court that ordered confinement. See *Brown* v. *Allen*, 344 U. S. 443, 506 (1953) (opinion of Frankfurter, J.) (noting that a federal habeas court should accept a state court's factual findings unless "a vital flaw be found in the process of ascertaining such facts in the State court"). Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. See *Ex parte Royall*, 117 U. S. 241, 251–252 (1886) (requiring exhaustion of state collateral processes). Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding. In cases involving state convictions this framework also respects federalism; and in federal cases it has added justification because the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal. The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant—as the parties have and as we do—or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. As already noted, see Part IV–C, *supra*, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may

not be aware of the most critical allegations that the Government relied upon to order his detention. See App. to Pet. for Cert. in No. 06–1196, at 156, ¶ F(8) (noting that the detainee can access only the "unclassified portion of the Government Information"). The detainee can confront witnesses that testify during the CSRT proceedings. *Id.*, at 144, ¶ *g*(8). But given that there are in effect no limits on the admission of hearsay evidence—the only requirement is that the tribunal deem the evidence "relevant and helpful," *ibid.*, ¶ *g*(9)—the detainee's opportunity to question witnesses is likely to be more theoretical than real.

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. See 542 U. S., at 538. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Nor could they. The § 2241 habeas corpus process remained in place, *id.*, at 525. Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause. True, there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner's due process rights begins. But the Court had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes, in the context of enemy combatant detentions. The closest the plurality came to doing so was in discussing whether, in light of separation-of-powers concerns, § 2241 should be construed to prohibit the District Court from inquiring beyond the affidavit Hamdi's custodian provided in answer to the detainee's habeas petition. The plurality answered this question with an emphatic "no." *Id.*, at 527 (labeling this argument as "extreme"); *id.*, at 535–536.

Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank* v. *Mangum*, 237 U. S. 309, 346 (1915) (dissenting opinion). Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. See 2 Chambers, Course of Lectures on English Law 1767–1773, at 6 ("Liberty may be violated either by arbitrary *imprisonment* without law or the appearance of law, or by a lawful magistrate for an unlawful reason"). This is so, as *Hayman* and *Swain* make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in *Hayman* and *Swain*. That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable *per se*.

Although we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See *Bismullah III*, 514 F. 3d, at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the post-conviction habeas setting. See *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963), overruled in part by *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 5 (1992). Here that opportunity is constitutionally required.

Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here. In two habeas cases involving enemy aliens tried for war crimes, *In re Yamashita*, 327 U. S. 1 (1946), and *Ex parte Quirin*, 317 U. S. 1 (1942), for example, this Court limited its review to determining whether the Executive had legal authority to try the petitioners by military commission. See *Yamashita*, *supra*, at 8 ("[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged"); *Quirin*, *supra*, at 25 ("We are not here concerned with any question of the guilt or innocence of petitioners"). Military courts are not courts of record. See *Watkins*, 3 Pet., at 209; Church 513. And the procedures used to try General Yamashita have been sharply criticized by Members of this Court. See *Hamdan*, 548 U. S., at 617; *Yamashita*, *supra*, at 41–81 (Rutledge, J., dissenting). We need not revisit these cases, however. For on their own terms, the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that is lacking here. See *Yama-*

shita, *supra*, at 5 (noting that General Yamashita was represented by six military lawyers and that "[t]hroughout the proceedings . . . defense counsel . . . demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged"); *Quirin*, *supra*, at 23–24; Exec. Order No. 9185, 7 Fed. Reg. 5103 (1942) (appointing counsel to represent the German saboteurs).

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

C

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards. "[W]e are obligated to construe the statute to avoid [constitutional] problems" if it is "'fairly possible'" to do so. *St. Cyr*, 533 U. S., at 299–300 (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932)). There are limits to this principle, however. The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. See *Clark* v. *Martinez*, 543 U. S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*"). We cannot ignore the text and purpose of a statute in order to save it.

The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify

detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF authorizes—and the Constitution permits—the indefinite detention of "enemy combatants" as the Department of Defense defines that term. Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant, a "standard" used by the CSRTs in petitioners' cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA § 7 to remain intact. See Tr. of Oral Arg. 37, 53.

The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request "review" of their CSRT determination in the Court of Appeals, DTA § 1005(e)(2)(B)(i), 119 Stat. 2742; but the "Scope of Review" provision confines the Court of Appeals' role to reviewing whether the CSRT followed the "standards and procedures" issued by the Department of Defense and assessing whether those "standards and procedures" are lawful, § 1005(e)(2)(C), *ibid.* Among these standards is "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence . . . allowing a rebuttable presumption in favor of the Government's evidence." § 1005(e)(2)(C)(i), *ibid.*

Assuming the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determina-

tions, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.

On its face the statute allows the Court of Appeals to consider no evidence outside the CSRT record. In the parallel litigation, however, the Court of Appeals determined that the DTA allows it to order the production of all "'reasonably available information in the possession of the U. S. Government bearing on the issue whether the detainee meets the criteria to be designated as an enemy combatant,'" regardless of whether this evidence was put before the CSRT. *Bismullah I*, 501 F. 3d, at 180. The Government, see Pet. for Cert. pending in *Gates* v. *Bismullah*, No. 07–1054 (hereinafter *Bismullah* Pet.), with support from five members of the Court of Appeals, see *Bismullah III*, 514 F. 3d, at 1299 (Henderson, J., dissenting from denial of rehearing en banc); *id.*, at 1302 (opinion of Randolph, J.) (same); *id.*, at 1306 (opinion of Brown, J.) (same), disagrees with this interpretation. For present purposes, however, we can assume that the Court of Appeals was correct that the DTA allows introduction and consideration of relevant exculpatory evidence that was "reasonably available" to the Government at the time of the CSRT but not made part of the record. Even so, the DTA review proceeding falls short of being a constitutionally adequate substitute, for the detainee still would have no opportunity to present evidence discovered after the CSRT proceedings concluded.

Under the DTA the Court of Appeals has the power to review CSRT determinations by assessing the legality of standards and procedures. This implies the power to inquire into what happened at the CSRT hearing and, perhaps, to remedy certain deficiencies in that proceeding. But should the Court of Appeals determine that the CSRT fol-

lowed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction. There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him.

This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. Petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard. See Brief for Boumediene Petitioners 5. If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court. Even under the Court of Appeals' generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, *e. g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be ap-

propriate. See *Williams* v. *Taylor*, 529 U. S. 420, 436–437 (2000) (noting that § 2254 "does not equate prisoners who exercise diligence in pursuing their claims with those who do not"). In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.

The Government does not make the alternative argument that the DTA allows for the introduction of previously unavailable exculpatory evidence on appeal. It does point out, however, that if a detainee obtains such evidence, he can request that the Deputy Secretary of Defense convene a new CSRT. See Supp. Brief for Federal Respondents 4. Whatever the merits of this procedure, it is an insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus. The Deputy Secretary's determination whether to initiate new proceedings is wholly a discretionary one. See Dept. of Defense, Office for the Administrative Review of the Detention of Enemy Combatants, Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status ¶ 5(d) (May 7, 2007) (Instruction 5421.1) ("The decision to convene a CSRT to reconsider the basis of the detainee's [enemy combatant] status in light of 'new evidence' is a matter vested in the unreviewable discretion of the [Deputy Secretary of Defense]"). And we see no way to construe the DTA to allow a detainee to challenge the Deputy Secretary's decision not to open a new CSRT pursuant to Instruction 5421.1. Congress directed the Secretary of Defense to devise procedures for considering new evidence, see DTA § 1005(a)(3), 119 Stat. 2741, but the detainee has no mechanism for ensuring that those procedures are followed. DTA § 1005(e)(2)(C), *id.*, at 2742, makes clear that the Court of Appeals' jurisdiction is "limited to consideration of . . . whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the

Secretary of Defense . . . and . . . whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(A), *ibid.*, further narrows the Court of Appeals' jurisdiction to reviewing "any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." The Deputy Secretary's determination whether to convene a new CSRT is not a "status determination of the [CSRT]," much less a "final decision" of that body.

We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation. Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus.

Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA § 7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

A

In light of our conclusion that there is no jurisdictional bar to the District Court's entertaining petitioners' claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances.

The Government argues petitioners must seek review of their CSRT determinations in the Court of Appeals before they can proceed with their habeas corpus actions in the District Court. As noted earlier, in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief. Most of these cases were brought by prisoners in state custody, *e. g.*, *Ex parte Royall*, 117 U. S. 241, and thus involved federalism concerns that are not relevant here. But we have extended this rule to require defendants in courts-martial to exhaust their military appeals before proceeding with a federal habeas corpus action. See *Schlesinger*, 420 U. S., at 758.

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of con-

finement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Cf. *Ex parte Milligan*, 4 Wall., at 127 ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course"). Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The first DTA review applications were filed over two years ago, but no decisions on the merits have been issued. While some delay in fashioning new proce-

dures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA § 7, 28 U. S. C. § 2241(e). Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

B

Although we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent. *Felker*, *Swain*, and *Hayman* stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.

In the DTA Congress sought to consolidate review of petitioners' claims in the Court of Appeals. Channeling future

cases to one district court would no doubt reduce administrative burdens on the Government. This is a legitimate objective that might be advanced even without an amendment to § 2241. If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, see *Rumsfeld* v. *Padilla*, 542 U. S. 426, 435–436 (2004), the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia. See 28 U. S. C. § 1404(a); *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 499, n. 15 (1973).

Another of Congress' reasons for vesting exclusive jurisdiction in the Court of Appeals, perhaps, was to avoid the widespread dissemination of classified information. The Government has raised similar concerns here and elsewhere. See Brief for Federal Respondents 55–56; *Bismullah* Pet. 30. We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. Cf. *United States* v. *Reynolds*, 345 U. S. 1, 10 (1953) (recognizing an evidentiary privilege in a civil damages case where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged").

These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

* * *

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S.

304, 320 (1936). Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer

boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. Cf. *Hamdan*, 548 U. S., at 636 (BREYER, J., concurring) ("[J]udicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so").

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

I join the Court's opinion in its entirety and add this afterword only to emphasize two things one might overlook after reading the dissents.

Four years ago, this Court in *Rasul* v. *Bush*, 542 U. S. 466 (2004), held that statutory habeas jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay, "to determine the legality of the Executive's potentially indefinite detention" of them, *id.*, at 485. Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all. JUSTICE SCALIA is thus correct that here, for the first time, this Court holds there is (he says "confers") constitutional habeas jurisdiction over aliens imprisoned by the military outside an area of *de jure* national sovereignty, see *post*, at 826 (dissenting opinion). But no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question. See, *e. g.*, 542 U. S., at 473, 481–483, and nn. 11–14. Indeed, the Court in *Rasul* directly answered the very historical question that JUSTICE SCALIA says is dispositive, see *post*, at 843; it wrote that "[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus," 542 U. S., at 481. JUSTICE SCALIA dismisses the statement as dictum, see *post*, at 846, but if dictum it was, it was dictum well considered, and it stated the view of five Members of this Court on the historical scope of the writ. Of course, it takes more than a quotation from *Rasul*, however much on point, to resolve the constitutional issue before us here, which the majority opinion has explored afresh in the detail it deserves. But whether one agrees or disagrees with today's decision, it is no bolt out of the blue.

A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years, *ante*, at 794 (opinion of the Court). Hence the hollow ring when the dissenters suggest that the Court is somehow

precipitating the Judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time. See, *e. g.*, *post*, at 803 (opinion of ROBERTS, C. J.) ("[T]he Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case"); *post*, at 805 ("[I]t is not necessary to consider the availability of the writ until the statutory remedies have been shown to be inadequate"); *post*, at 807 ("[The Court] rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary"). These suggestions of judicial haste are all the more out of place given the Court's realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country. See *ante*, at 793–794.

It is in fact the very lapse of four years from the time *Rasul* put everyone on notice that habeas process was available to Guantanamo prisoners, and the lapse of six years since some of these prisoners were captured and incarcerated, that stand at odds with the repeated suggestions of the dissenters that these cases should be seen as a judicial victory in a contest for power between the Court and the political branches. See *post*, at 801, 802, 826 (opinion of ROBERTS, C. J.); *post*, at 830–831, 842–843, 849–850 (opinion of SCALIA, J.). The several answers to the charge of triumphalism might start with a basic fact of Anglo-American constitutional history: that the power, first of the Crown and now of the Executive Branch of the United States, is necessarily limited by habeas corpus jurisdiction to enquire into the legality of executive detention. And one could explain that in this Court's exercise of responsibility to preserve habeas corpus something much more significant is involved than pulling and hauling between the judicial and political branches. Instead, though, it is enough to repeat that some

of these petitioners have spent six years behind bars. After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation. See *ante*, at 797.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has exhausted the procedures under the law. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus—its opinion begins by deciding that question. I regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. I nonetheless agree with JUSTICE SCALIA's analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent. The important point for me, however, is that the Court should have resolved these cases on other grounds.

Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called "habeas" or something else.

Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. See Detainee Treatment Act of 2005 (DTA), § 1005(e)(2)(A), 119 Stat. 2742. But before the D. C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. The Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an "adequate substitute" for habeas, *ante*, at 772, but even then its opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right—one that is to be given shape only in the future by district courts on a case-by-case basis. This whole approach is misguided.

It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured

abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent.

I

The Court's opinion makes plain that certiorari to review these cases should never have been granted. As two Members of today's majority once recognized, "traditional rules governing our decision of constitutional questions and our practice of requiring the exhaustion of available remedies . . . make it appropriate to deny these petitions." *Boumediene* v. *Bush*, 549 U. S. 1328, 1329 (2007) (STEVENS and KENNEDY, JJ., statement respecting denial of certiorari) (citation omitted). Just so. Given the posture in which these cases came to us, the Court should have declined to intervene until the D. C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case.

The political branches created a two-part, collateral review procedure for testing the legality of the prisoners' detention: It begins with a hearing before a Combatant Status Review Tribunal (CSRT) followed by review in the D. C. Circuit. As part of that review, Congress authorized the D. C. Circuit to decide whether the CSRT proceedings are consistent with "the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742. No petitioner, however, has invoked the D. C. Circuit review the statute specifies. See 476 F. 3d 981, 994, and n. 16 (CADC 2007); Brief for Federal Respondents 41–43. As a consequence, that court has had no occasion to decide whether the CSRT hearings, followed by review in the Court of Appeals, vindicate whatever constitutional and statutory rights petitioners may possess. See 476 F. 3d, at 994, and n. 16.

Remarkably, this Court does not require petitioners to exhaust their remedies under the statute; it does not wait to see whether those remedies will prove sufficient to protect

petitioners' rights. Instead, it not only denies the D. C. Circuit the opportunity to assess the statute's remedies, it refuses to do so itself: The majority expressly declines to decide whether the CSRT procedures, coupled with Article III review, satisfy due process. See *ante*, at 785.

It is grossly premature to pronounce on the detainees' right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim. The plurality in *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 533 (2004), explained that the Constitution guaranteed an American *citizen* challenging his detention as an enemy combatant the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." The plurality specifically stated that constitutionally adequate collateral process could be provided "by an appropriately authorized and properly constituted military tribunal," given the "uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.*, at 533, 538. This point is directly pertinent here, for surely the Due Process Clause does not afford *non*-citizens in such circumstances greater protection than citizens are due.

If the CSRT procedures meet the minimal due process requirements outlined in *Hamdi*, and if an Article III court is available to ensure that these procedures are followed in future cases, see *id.*, at 536; *INS* v. *St. Cyr*, 533 U. S. 289, 304 (2001); *Heikkila* v. *Barber*, 345 U. S. 229, 236 (1953), there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" or something else. The question of the writ's reach need not be addressed.

This is why the Court should have required petitioners to exhaust their remedies under the statute. As we explained in *Gusik* v. *Schilder*, 340 U. S. 128, 132 (1950): "If an available procedure has not been employed to rectify the alleged

error" petitioners complain of, "any interference by [a] federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion." Because the majority refuses to assess whether the CSRTs comport with the Constitution, it ends up razing a system of collateral review that it admits may in fact satisfy the Due Process Clause and be "structurally sound." *Ante*, at 785. But if the collateral review procedures Congress has provided—CSRT review coupled with Article III scrutiny—are sound, interference by a federal habeas court may be entirely unnecessary.

The only way to know is to require petitioners to use the alternative procedures Congress designed. Mandating that petitioners exhaust their statutory remedies "is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile." *Gusik*, *supra*, at 132. So too here, it is not necessary to consider the availability of the writ until the statutory remedies have been shown to be inadequate to protect the detainees' rights. Cf. 28 U. S. C. §2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"). Respect for the judgments of Congress—whose Members take the same oath we do to uphold the Constitution—requires no less.

In the absence of any assessment of the DTA's remedies, the question whether detainees are entitled to habeas is an entirely speculative one. Our precedents have long counseled us to avoid deciding such hypothetical questions of constitutional law. See *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such [questions are] un-

avoidable"); see also *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (Constitutional questions should not be decided unless " 'absolutely necessary to a decision of the case' " (quoting *Burton* v. *United States*, 196 U. S. 283, 295 (1905))). This is a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984).

The Court acknowledges that "the ordinary course" would be not to decide the constitutionality of the DTA at this stage, but abandons that "ordinary course" in light of the "gravity" of the constitutional issues presented and the prospect of additional delay. *Ante*, at 772. It is, however, precisely when the issues presented are grave that adherence to the ordinary course is most important. A principle applied only when unimportant is not much of a principle at all, and charges of judicial activism are most effectively rebutted when courts can fairly argue they are following normal practices.

The Court is also concerned that requiring petitioners to pursue "DTA review before proceeding with their habeas corpus actions" could involve additional delay. *Ante*, at 794. The nature of the habeas remedy the Court instructs lower courts to craft on remand, however, is far more unsettled than the process Congress provided in the DTA. See *ante*, at 798 ("[O]ur opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined"). There is no reason to suppose that review according to procedures the Federal Judiciary will design, case by case, will proceed any faster than the DTA process petitioners disdained.

On the contrary, the system the Court has launched (and directs lower courts to elaborate) promises to take longer. The Court assures us that before bringing their habeas petitions, detainees must usually complete the CSRT process. See *ante*, at 795. Then they may seek review in federal district court. Either success or failure there will surely result

in an appeal to the D. C. Circuit—exactly where judicial review *starts* under Congress's system. The effect of the Court's decision is to add additional layers of quite possibly redundant review. And because nobody knows how these new layers of "habeas" review will operate, or what new procedures they will require, their contours will undoubtedly be subject to fresh bouts of litigation. If the majority were truly concerned about delay, it would have required petitioners to use the DTA process that has been available to them for 2½ years, with its Article III review in the D. C. Circuit. That system might well have provided petitioners all the relief to which they are entitled long before the Court's newly installed habeas review could hope to do so.[1]

The Court's refusal to require petitioners to exhaust the remedies provided by Congress violates the "traditional rules governing our decision of constitutional questions." *Boumediene*, 549 U. S., at 1329 (STEVENS and KENNEDY, JJ., statement respecting denial of certiorari). The Court's disrespect for these rules makes its decision an awkward business. It rushes to decide the fundamental question of the reach of habeas corpus when the functioning of the DTA may make that decision entirely unnecessary, and it

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[1] In light of the foregoing, the concurrence is wrong to suggest that I "insufficiently appreciat[e]" the issue of delay in these cases. See *ante*, at 799 (opinion of SOUTER, J.). This Court issued its decisions in *Rasul* v. *Bush*, 542 U. S. 466, and *Hamdi* v. *Rumsfeld*, 542 U. S. 507, in 2004. The concurrence makes it sound as if the political branches have done nothing in the interim. In fact, Congress responded 18 months later by enacting the DTA. Congress cannot be faulted for taking that time to consider how best to accommodate both the detainees' interests and the need to keep the American people safe. Since the DTA became law, petitioners have steadfastly resisted the statute's review mechanisms, preferring to proceed under habeas. It is unfair to complain that the DTA system involves too much delay when petitioners have opted to litigate rather than pursue its procedures. Today's decision obligating district courts to craft new procedures to replace those in the DTA will only prolong the process—and delay relief.

does so with scant idea of how DTA judicial review will actually operate.

II

The majority's overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court's opinion fails on its own terms. The majority strikes down the statute because it is not an "adequate substitute" for habeas review, *ante*, at 772, but fails to show what rights the detainees have that cannot be vindicated by the DTA system.

Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims and, when necessary, order release. See *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result). Beyond that, the process a given prisoner is entitled to receive depends on the circumstances and the rights of the prisoner. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). After much hemming and hawing, the majority appears to concede that the DTA provides an Article III court competent to order release. See *ante*, at 787–788. The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. *Hamdi* concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

A

The Court reaches the opposite conclusion partly because it misreads the statute. The majority appears not to understand how the review system it invalidates actually works—specifically, how CSRT review and review by the D. C. Circuit fit together. After briefly acknowledging in its reci-

tation of the facts that the Government designed the CSRTs "to comply with the due process requirements identified by the plurality in *Hamdi*," *ante*, at 734, the Court proceeds to dismiss the tribunal proceedings as no more than a suspect method used by the Executive for determining the status of the detainees in the first instance, see *ante*, at 783. This leads the Court to treat the review the DTA provides in the D. C. Circuit as the only opportunity detainees have to challenge their status determination. See *ante*, at 778.

The Court attempts to explain its glancing treatment of the CSRTs by arguing that "[w]hether one characterizes the CSRT process as direct review of the Executive's battlefield determination . . . or as the first step in the collateral review of a battlefield determination makes no difference." *Ante*, at 783. First of all, the majority is quite wrong to dismiss the Executive's determination of detainee status as no more than a "battlefield" judgment, as if it were somehow provisional and made in great haste. In fact, detainees are designated "enemy combatants" only after "multiple levels of review by military officers and officials of the Department of Defense." Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base (July 29, 2004), App. J to Pet. for Cert. in No. 06–1196, p. 150 (hereinafter Implementation Memo).

The majority is equally wrong to characterize the CSRTs as part of that initial determination process. They are instead a means for detainees to *challenge* the Government's determination. The Executive designed the CSRTs to mirror Army Regulation 190–8, see Brief for Federal Respondents 48, the very procedural model the plurality in *Hamdi* said provided the type of process an enemy combatant could expect from a habeas court, see 542 U. S., at 538 (plurality opinion). The CSRTs operate much as habeas courts would if hearing the detainee's collateral challenge for the first time: They gather evidence, call witnesses, take testimony,

and render a decision on the legality of the Government's detention. See Implementation Memo 153–162. If the CSRT finds a particular detainee has been improperly held, it can order release. See *id.*, at 164.

The majority insists that even if "the CSRTs satisf[ied] due process standards," full habeas review would still be necessary, because habeas is a collateral remedy available even to prisoners "detained pursuant to the most rigorous proceedings imaginable." *Ante*, at 785. This comment makes sense only if the CSRTs are incorrectly viewed as a method used by the Executive for determining the prisoners' status, and not as themselves part of the collateral review to test the validity of that determination. See *Gusik*, 340 U. S., at 132. The majority can deprecate the importance of the CSRTs only by treating them as something they are not.

The use of a military tribunal such as the CSRTs to review the aliens' detention should be familiar to this Court in light of the *Hamdi* plurality, which said that the due process rights enjoyed by *American citizens* detained as enemy combatants could be vindicated "by an appropriately authorized and properly constituted military tribunal." 542 U. S., at 538. The DTA represents Congress's considered attempt to provide the accused alien combatants detained at Guantanamo a constitutionally adequate opportunity to contest their detentions before just such a tribunal.

But Congress went further in the DTA. CSRT review is just the first tier of collateral review in the DTA system. The statute provides additional review in an Article III court. Given the rationale of today's decision, it is well worth recalling exactly what the DTA provides in this respect. The statute directs the D. C. Circuit to consider whether a particular alien's status determination "was consistent with the standards and procedures specified by the Secretary of Defense" *and* "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA

§ 1005(e)(2)(C), 119 Stat. 2742. That is, a *court* determines whether the CSRT procedures are constitutional, and a *court* determines whether those procedures were followed in a particular case.

In short, the *Hamdi* plurality concluded that this type of review would be enough to satisfy due process, even for citizens. See 542 U. S., at 538. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.

Hamdi merits scant attention from the Court—a remarkable omission, as *Hamdi* bears directly on the issues before us. The majority attempts to dismiss *Hamdi*'s relevance by arguing that because the availability of § 2241 federal habeas was never in doubt in that case, "the Court had no occasion to define the necessary scope of habeas review . . . in the context of enemy combatant detentions." *Ante*, at 784. Hardly. *Hamdi* was all about the scope of habeas review in the context of enemy combatant detentions. The petitioner, an American citizen held within the United States as an enemy combatant, invoked the writ to challenge his detention. 542 U. S., at 510–511. After "a careful examination both of the writ . . . and of the Due Process Clause," this Court enunciated the "basic process" the Constitution entitled Hamdi to expect from a habeas court under § 2241. *Id.*, at 525, 534. That process consisted of the right to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.*, at 533. In light of the Government's national security responsibilities, the plurality found the process could be "tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict." *Ibid.* For example, the Government could rely on hearsay and could claim a presumption in favor of its own evidence. See *id.*, at 533–534.

Hamdi further suggested that this "basic process" on collateral review could be provided by a military tribunal. It

pointed to prisoner-of-war tribunals as a model that would satisfy the Constitution's requirements. See *id.*, at 538. Only "[i]n the *absence* of such process" before a military tribunal, the Court held, would Article III courts need to conduct full-dress habeas proceedings to "ensure that the minimum requirements of due process are achieved." *Ibid.* (emphasis added). And even then, the petitioner would be entitled to no more process than he would have received from a properly constituted military review panel, given his limited due process rights and the Government's weighty interests. See *id.*, at 533–534, 538.

Contrary to the majority, *Hamdi* is of pressing relevance because it establishes the procedures American *citizens* detained as enemy combatants can expect from a habeas court proceeding under § 2241. The DTA system of military tribunal hearings followed by Article III review looks a lot like the procedure *Hamdi* blessed. If nothing else, it is plain from the design of the DTA that Congress, the President, and this Nation's military leaders have made a good-faith effort to follow our precedent.

The Court, however, will not take "yes" for an answer. The majority contends that "[i]f Congress had envisioned DTA review as coextensive with traditional habeas corpus," it would have granted the D. C. Circuit far broader review authority. *Ante*, at 777. Maybe so, but that comment reveals the majority's misunderstanding. "[T]raditional habeas corpus" takes *no* account of what *Hamdi* recognized as the "uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U. S., at 533. Besides, Congress and the Executive did not envision "DTA review"—by which I assume the Court means D. C. Circuit review, see *ante*, at 777—as the detainees' only opportunity to challenge their detentions. Instead, the political branches crafted CSRT *and* D. C. Circuit review to operate together, with the goal of providing noncitizen detainees the level of collateral process *Hamdi* said would satisfy the due

process rights of American citizens. See Brief for Federal Respondents 48–53.

B

Given the statutory scheme the political branches adopted, and given *Hamdi*, it simply will not do for the majority to dismiss the CSRT procedures as "far more limited" than those used in military trials, and therefore beneath the level of process "that would eliminate the need for habeas corpus review." *Ante*, at 767. The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures—coupled with the judicial review specified by the DTA—provide the "basic process" *Hamdi* said the Constitution affords American citizens detained as enemy combatants. See 542 U. S., at 534.

By virtue of its refusal to allow the D. C. Circuit to assess petitioners' statutory remedies, and by virtue of its own refusal to consider, at the outset, the fit between those remedies and due process, the majority now finds itself in the position of evaluating whether the DTA system is an adequate substitute for habeas review without knowing what rights either habeas or the DTA is supposed to protect. The majority attempts to elide this problem by holding that petitioners have a right to habeas corpus and then comparing the DTA against the "historic office" of the writ. *Ante*, at 776. But habeas is, as the majority acknowledges, a flexible remedy rather than a substantive right. Its "precise application . . . change[s] depending upon the circumstances." *Ante*, at 779. The shape of habeas review ultimately depends on the nature of the rights a petitioner may assert. See, *e. g.*, *Reid* v. *Covert*, 354 U. S. 1, 75 (1957) (Harlan, J., concurring in result) ("[T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case").

The scope of federal habeas review is traditionally more limited in some contexts than in others, depending on the status of the detainee and the rights he may assert. See *St. Cyr*, 533 U. S., at 306 ("In [immigration cases], other than the question whether there was some evidence to support the [deportation] order, the courts generally did not review factual determinations made by the Executive" (footnote omitted)); *Burns* v. *Wilson*, 346 U. S. 137, 139 (1953) (plurality opinion) ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases"); *In re Yamashita*, 327 U. S. 1, 8 (1946) ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review"); *Ex parte Quirin*, 317 U. S. 1, 25 (1942) (federal habeas review of military commission verdict limited to determining commission's jurisdiction).

Declaring that petitioners have a right to habeas in no way excuses the Court from explaining why the DTA does not protect whatever due process or statutory rights petitioners may have. Because if the DTA provides a means for vindicating petitioners' rights, it is necessarily an adequate substitute for habeas corpus. See *Swain* v. *Pressley*, 430 U. S. 372, 381 (1977); *United States* v. *Hayman*, 342 U. S. 205, 223 (1952).

For my part, I will assume that any due process rights petitioners may possess are no greater than those of American citizens detained as enemy combatants. It is worth noting again that the *Hamdi* controlling opinion said the Constitution guarantees citizen detainees only "basic" procedural rights, and that the process for securing those rights can "be tailored to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U. S., at 533. The majority, however, objects that "the procedural protections afforded to the detainees in the CSRT hearings

are . . . limited." *Ante*, at 767. But the evidentiary and other limitations the Court complains of reflect the nature of the issue in contest, namely, the status of aliens captured by our Armed Forces abroad and alleged to be enemy combatants. Contrary to the repeated suggestions of the majority, DTA review need not parallel the habeas privileges enjoyed by noncombatant American citizens, as set out in 28 U. S. C. § 2241 (2000 ed. and Supp. V). Cf. *ante*, at 777–778. It need only provide process adequate for noncitizens detained as alleged combatants.

To what basic process are these detainees due as habeas petitioners? We have said that "at the absolute minimum," the Suspension Clause protects the writ "'as it existed in 1789.'" *St. Cyr*, *supra*, at 301 (quoting *Felker* v. *Turpin*, 518 U. S. 651, 663–664 (1996)). The majority admits that a number of historical authorities suggest that at the time of the Constitution's ratification, "common-law courts abstained altogether from matters involving prisoners of war." *Ante*, at 747. If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient—it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority's own standards. Today's Court opines that the Suspension Clause guarantees prisoners such as the detainees "a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law." *Ante*, at 779 (internal quotation marks omitted). Further, the Court holds that to be an adequate substitute, any tribunal reviewing the detainees' cases "must have the power to order the conditional release of an individual unlawfully detained." *Ibid.* The DTA system—CSRT review of the Executive's determination followed by D. C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process—meets these criteria.

C

At the CSRT stage, every petitioner has the right to present evidence that he has been wrongfully detained. This includes the right to call witnesses who are reasonably available, question witnesses called by the tribunal, introduce documentary evidence, and testify before the tribunal. See Implementation Memo 154–156, 158–159, 161.

While the Court concedes detainees may confront all witnesses called before the tribunal, it suggests this right is "more theoretical than real" because "there are in effect no limits on the admission of hearsay evidence." *Ante*, at 784. The Court further complains that petitioners lack "the assistance of counsel," and—given the limits on their access to classified information—"may not be aware of the most critical allegations" against them. *Ante*, at 783–784. None of these complaints is persuasive.

Detainees not only have the opportunity to confront any witness who appears before the tribunal, they may call witnesses of their own. The Implementation Memo requires only that detainees' witnesses be "reasonably available," App. J to Pet. for Cert. in No. 06–1196, ¶F(6), at 155, a requirement drawn from Army Regulation 190–8, ch. 1, § 1–6(*e*)(6), and entirely consistent with the Government's interest in avoiding "a futile search for evidence" that might burden warmaking responsibilities, *Hamdi*, *supra*, at 532. The dangerous mission assigned to our forces abroad is to fight terrorists, not serve subpoenas. The Court is correct that some forms of hearsay evidence are admissible before the CSRT, but *Hamdi* expressly approved this use of hearsay by habeas courts. 542 U. S., at 533–534 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government").

As to classified information, while detainees are not permitted access to it themselves, the Implementation Memo provides each detainee with a "Personal Representative" who may review classified documents and comment on this

evidence to the CSRT on the detainee's behalf. Implementation Memo 152, 154–156; Brief for Federal Respondents 54–55. The prisoner's counsel enjoys the same privilege on appeal before the D. C. Circuit. That is more access to classified material for alleged alien enemy combatants than ever before provided. I am not aware of a single instance—and certainly the majority cites none—in which detainees such as petitioners have been provided access to classified material in *any* form. Indeed, prisoners of war who challenge their status determinations under the Geneva Convention are afforded no such access, see Army Regulation 190–8, ch. 1, §§1–6(*e*)(3) and (5), and the prisoner-of-war model is the one *Hamdi* cited as consistent with the demands of due process for *citizens*, see 542 U. S., at 538.

What alternative does the Court propose? Allow free access to classified information and ignore the risk the prisoner may eventually convey what he learns to parties hostile to this country, with deadly consequences for those who helped apprehend the detainee? If the Court can design a better system for communicating to detainees the substance of any classified information relevant to their cases, without fatally compromising national security interests and sources, the majority should come forward with it. Instead, the majority fobs that vexing question off on district courts to answer down the road.

Prisoners of war are not permitted access to classified information, and neither are they permitted access to counsel, another supposed failing of the CSRT process. And yet the Guantanamo detainees are hardly denied all legal assistance. They are provided a "Personal Representative" who, as previously noted, may access classified information, help the detainee arrange for witnesses, assist the detainee's preparation of his case, and even aid the detainee in presenting his evidence to the tribunal. See Implementation Memo 161. The provision for a personal representative on this order is one of several ways in which the CSRT procedures

are *more* generous than those provided prisoners of war under Army Regulation 190–8.

Keep in mind that all this is just at the CSRT stage. Detainees receive additional process before the D. C. Circuit, including full access to appellate counsel and the right to challenge the factual and legal bases of their detentions. DTA § 1005(e)(2)(C) empowers the Court of Appeals to determine not only whether the CSRT observed the "procedures specified by the Secretary of Defense," but also "whether the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States." 119 Stat. 2742. These provisions permit detainees to dispute the sufficiency of the evidence against them. They allow detainees to challenge a CSRT panel's interpretation of any relevant law, and even the constitutionality of the CSRT proceedings themselves. This includes, as the Solicitor General acknowledges, the ability to dispute the Government's right to detain alleged combatants in the first place, and to dispute the Government's definition of "enemy combatant." Brief for Federal Respondents 59. All this before an Article III court—plainly a neutral decisionmaker.

All told, the DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow. The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

D

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. See *ante*, at 790. The Court hints darkly that the DTA may suffer from other infirmities, see *ante*, at 792 ("We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limita-

tions on the detainee's ability to present exculpatory evidence"), but it does not bother to name them, making a response a bit difficult. As it stands, I can only assume the Court regards the supposed defect it did identify as the gravest of the lot.

If this is the most the Court can muster, the ice beneath its feet is thin indeed. As noted, the CSRT procedures provide ample opportunity for detainees to introduce exculpatory evidence—whether documentary in nature or from live witnesses—before the military tribunals. See *supra*, at 816–817; Implementation Memo 155–156. And if their ability to introduce such evidence is denied contrary to the Constitution or laws of the United States, the D. C. Circuit has the authority to say so on review.

Nevertheless, the Court asks us to imagine an instance in which evidence is discovered *after* the CSRT panel renders its decision, but *before* the Court of Appeals reviews the detainee's case. This scenario, which of course has not yet come to pass as no review in the D. C. Circuit has occurred, provides no basis for rejecting the DTA as a habeas substitute. While the majority is correct that the DTA does not contemplate the introduction of "newly discovered" evidence before the Court of Appeals, petitioners and the Solicitor General agree that the DTA *does* permit the D. C. Circuit to remand a detainee's case for a new CSRT determination. Brief for Petitioner Boumediene et al. in No. 06–1195, p. 30; Brief for Federal Respondents 60–61. In the event a detainee alleges that he has obtained new and persuasive exculpatory evidence that would have been considered by the tribunal below had it only been available, the D. C. Circuit could readily remand the case to the tribunal to allow that body to consider the evidence in the first instance. The Court of Appeals could later review any new or reinstated decision in light of the supplemented record.

If that sort of procedure sounds familiar, it should. Federal appellate courts reviewing factual determinations follow

just such a procedure in a variety of circumstances. See, *e. g.*, *United States* v. *White*, 492 F. 3d 380, 413 (CA6 2007) (remanding new-evidence claim to the district court for a *Brady* evidentiary hearing); *Avila* v. *Roe*, 298 F. 3d 750, 754 (CA9 2002) (remanding habeas claim to the district court for evidentiary hearing to clarify factual record); *United States* v. *Leone*, 215 F. 3d 253, 256 (CA2 2000) (observing that when faced on direct appeal with an underdeveloped claim for ineffective assistance of counsel, the appellate court may remand to the district court for necessary factfinding).

A remand is not the only relief available for detainees caught in the Court's hypothetical conundrum. The DTA expressly directs the Secretary of Defense to "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee." § 1005(a)(3), 119 Stat. 2741. Regulations issued by the Department of Defense provide that when a detainee puts forward new, material evidence "not previously presented to the detainee's CSRT," the Deputy Secretary of Defense "'will direct that a CSRT convene to reconsider the basis of the detainee's . . . status in light of the new information.'" Office for the Administrative Review of the Detention of Enemy Combatants, Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status ¶¶ 4(a)(1), 5(b) (May 7, 2007); Brief for Federal Respondents 56, n. 30. Pursuant to DTA § 1005(e)(2)(A), the resulting CSRT determination is again reviewable in full by the D. C. Circuit.[2]

[2] The Court wonders what might happen if the detainee puts forward new material evidence but the Deputy Secretary refuses to convene a new CSRT. See *ante*, at 791–792. The answer is that the detainee can petition the D. C. Circuit for review. The DTA directs that the procedures for review of new evidence be included among "[t]he procedures submitted under paragraph (1)(A)" governing CSRT review of enemy combatant status. § 1405(a)(3), 119 Stat. 3476. It is undisputed that the D. C. Circuit has statutory authority to review and enforce these procedures. See DTA § 1005(e)(2)(C)(i), *id.*, at 2742.

In addition, DTA § 1005(d)(1) further requires the Department of Defense to conduct a yearly review of the status of each prisoner. See 119 Stat. 2741. The Deputy Secretary of Defense has promulgated concomitant regulations establishing an Administrative Review Board to assess "annually the need to continue to detain each enemy combatant." Deputy Secretary of Defense Order OSD 06942–04 (May 11, 2004), App. K to Pet. for Cert. in No. 06–1196, at 189. In the words of the implementing order, the purpose of this annual review is to afford every detainee the opportunity "to explain why he is no longer a threat to the United States" and should be released. *Ibid.* The Board's findings are forwarded to a presidentially appointed, Senate-confirmed civilian within the Department of Defense whom the Secretary of Defense has designated to administer the review process. This designated civilian official has the authority to order release upon the Board's recommendation. *Id.*, at 201.

The Court's hand wringing over the DTA's treatment of later discovered exculpatory evidence is the most it has to show after a roving search for constitutionally problematic scenarios. But "[t]he delicate power of pronouncing an Act of Congress unconstitutional," we have said, "is not to be exercised with reference to hypothetical cases thus imagined." *United States* v. *Raines*, 362 U. S. 17, 22 (1960). The Court today invents a sort of reverse facial challenge and applies it with gusto: If there is *any* scenario in which the statute *might* be constitutionally infirm, the law must be struck down. Cf. *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) ("A facial challenge . . . must establish that no set of circumstances exists under which the Act would be valid"); see also *Washington* v. *Glucksberg*, 521 U. S. 702, 739–740, and n. 7 (1997) (STEVENS, J., concurring in judgments) (facial challenge must fail where the statute has "'plainly legitimate sweep'" (quoting *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973))). The Court's new method

of constitutional adjudication only underscores its failure to follow our usual procedures and require petitioners to demonstrate that *they* have been harmed by the statute they challenge. In the absence of such a concrete showing, the Court is unable to imagine a plausible hypothetical in which the DTA is unconstitutional.

E

The Court's second criterion for an adequate substitute is the "power to order the conditional release of an individual unlawfully detained." *Ante*, at 779. As the Court basically admits, the DTA can be read to permit the D. C. Circuit to order release in light of our traditional principles of construing statutes to avoid difficult constitutional issues, when reasonably possible. See *ante*, at 787–788.

The Solicitor General concedes that remedial authority of some sort must be implied in the statute, given that the DTA—like the general habeas law itself, see 28 U. S. C. §2243—provides no express remedy of any kind. Brief for Federal Respondents 60–61. The parties agree that at the least, the DTA empowers the D. C. Circuit to remand a prisoner's case to the CSRT with instructions to perform a new status assessment. Brief for Petitioner Boumediene et al. in No. 06–1195, at 30; Brief for Federal Respondents 60–61. To avoid constitutional infirmity, it is reasonable to imply more, see *Ashwander*, 297 U. S., at 348 (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will . . . ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided" (internal quotation marks omitted)); see also *St. Cyr*, 533 U. S., at 299–300, especially in view of the Solicitor General's concession at oral argument and in his supplemental brief that authority to release might be read in the statute, see Tr. of Oral Arg. 37; Supplemental Brief for Federal Respondents 9.

The Court grudgingly suggests that "we can assume congressional silence permits a constitutionally required remedy." *Ante*, at 788. But the argument in favor of statutorily authorized release is stronger than that. The DTA's parallels to 28 U. S. C. §2243 on this score are noteworthy. By way of remedy, the general federal habeas statute provides only that the court, having heard and determined the facts, shall "dispose of the matter as law and justice require." *Ibid.* We have long held, and no party here disputes, that this includes the power to order release. See *Wilkinson* v. *Dotson*, 544 U. S. 74, 79 (2005) ("[T]he writ's history makes clear that it traditionally has been accepted as the specific instrument to obtain release from [unlawful] confinement" (internal quotation marks omitted)).

The DTA can be similarly read. Because Congress substituted DTA review for habeas corpus and because the "unique purpose" of the writ is "to release the applicant . . . from unlawful confinement," *Allen* v. *McCurry*, 449 U. S. 90, 98, n. 12 (1980), DTA §1005(e)(2) can and should be read to confer on the Court of Appeals the authority to order release in appropriate circumstances. Section 1005(e)(2)(D) plainly contemplates release, addressing the effect "release of [an] alien from the custody of the Department of Defense" will have on the jurisdiction of the court. 119 Stat. 2742–2743. This reading avoids serious constitutional difficulty and is consistent with the text of the statute.

The D. C. Circuit can thus order release, the CSRTs can order release, and the head of the Administrative Review Boards can, at the recommendation of those panels, order release. These multiple release provisions within the DTA system more than satisfy the majority's requirement that any tribunal substituting for a habeas court have the authority to release the prisoner.

The basis for the Court's contrary conclusion is summed up in the following sentence near the end of its opinion: "To hold that the detainees at Guantanamo may, under the DTA,

challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them." *Ante*, at 792. In other words, any interpretation of the statute that would make it an adequate substitute for habeas must be rejected, because Congress could not possibly have intended to enact an adequate substitute for habeas. The Court could have saved itself a lot of trouble if it had simply announced this Catch-22 approach at the beginning rather than the end of its opinion.

III

For all its eloquence about the detainees' right to the writ, the Court makes no effort to elaborate how exactly the remedy it prescribes will differ from the procedural protections detainees enjoy under the DTA. The Court objects to the detainees' limited access to witnesses and classified material, but proposes no alternatives of its own. Indeed, it simply ignores the many difficult questions its holding presents. What, for example, will become of the CSRT process? The majority says federal courts should *generally* refrain from entertaining detainee challenges until after the petitioner's CSRT proceeding has finished. See *ante*, at 795 ("[e]xcept in cases of undue delay"). But to what deference, if any, is that CSRT determination entitled?

There are other problems. Take witness availability. What makes the majority think witnesses will become magically available when the review procedure is labeled "habeas"? Will the location of most of these witnesses change—will they suddenly become easily susceptible to service of process? Or will subpoenas issued by American habeas courts run to Basra? And if they did, how would they be enforced? Speaking of witnesses, will detainees be able to call active-duty military officers as witnesses? If not, why not?

The majority has no answers for these difficulties. What it does say leaves open the distinct possibility that its "habeas" remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects. See *ante*, at 796 ("We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible"). But "[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Landon* v. *Plasencia*, 459 U. S. 21, 34–35 (1982).

The majority rests its decision on abstract and hypothetical concerns. Step back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants:

- The right to hear the bases of the charges against them, including a summary of any classified evidence.
- The ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process. Brief for Federal Respondents 57, 60.
- The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate.
- The right to the aid of a personal representative in arranging and presenting their cases before a CSRT.
- Before the D. C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal's legal determinations, ensure compliance with the Consti-

tution and laws, and secure release, if any errors below establish their entitlement to such relief.

In sum, the DTA satisfies the majority's own criteria for assessing adequacy. This statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees—whether citizens or aliens—in our national history.

* * *

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D. C. Circuit—where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to "determine—through democratic means—how best" to balance the security of the American people with the detainees' liberty interests, see *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 636 (2006) (BREYER, J., concurring), has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of

an ongoing war. THE CHIEF JUSTICE's dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires.

I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.

I

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. See National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report, pp. 60–61, 70, 190 (2004). On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D. C., and 40 in Pennsylvania. See *id.*, at 552, n. 188. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war

harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant *abandonment* of such a principle that produces the decision today. The President relied on our settled precedent in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense, p. 1 (Dec. 28, 2001). Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.

In the long term, then, the Court's decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. See S. Rep. No. 110–90, pt. 7, p. 13 (2007) (minority views of Sens. Kyl, Sessions, Graham, Cornyn, and Coburn) (hereinafter Minority Report). Some have been captured or killed. See *ibid.*; see also Mintz, Released Detainees Rejoining the Fight, Washington Post, Oct. 22, 2004, pp. A1, A12. But others have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnaping of two Chi-

nese dam workers, one of whom was later shot to death when used as a human shield against Pakistani commandoes. See Khan & Lancaster, Pakistanis Rescue Hostage; 2nd Dies, Washington Post, Oct. 15, 2004, p. A18. Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Mintz, *supra*. Still another murdered an Afghan judge. See Minority Report 13. It was reported only last month that a released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq. See White, Ex-Guantanamo Detainee Joined Iraq Suicide Attack, Washington Post, May 8, 2008, p. A18.

These, mind you, were detainees whom *the military* had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. As THE CHIEF JUSTICE's dissent makes clear, we have no idea what those procedural and evidentiary rules are, but they will be determined by civil courts and (in the Court's contemplation at least) will be more detainee-friendly than those now applied, since otherwise there would be no reason to hold the congressionally prescribed procedures unconstitutional. If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of the enemy returned to combat will obviously increase.

But even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies. And one escalation of procedures that the Court *is* clear about is affording the detainees increased access to witnesses (perhaps troops serv-

ing in Afghanistan?) and to classified information. See *ante*, at 783–784. During the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the "Blind Sheik's" defense lawyers; that information was in the hands of Osama Bin Laden within two weeks. See Minority Report 14–15. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities. See *id.*, at 15.

And today it is not just the military that the Court elbows aside. A mere two Terms ago in *Hamdan* v. *Rumsfeld*, 548 U. S. 557 (2006), when the Court held (quite amazingly) that the Detainee Treatment Act of 2005 had not stripped habeas jurisdiction over Guantanamo petitioners' claims, four Members of today's five-Justice majority joined an opinion saying the following:

> "Nothing prevents the President from returning to Congress to seek the authority [for trial by military commission] he believes necessary.
>
> "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means." *Id.*, at 636 (BREYER, J., concurring).[1]

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[1] Even today, the Court cannot resist striking a pose of faux deference to Congress and the President. Citing the above quoted passage, the Court says: "The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism." *Ante*, at 798. Indeed. What the Court apparently means is that the political branches can debate, after which the Third Branch will decide.

Turns out they were just kidding. For in response, Congress, at the President's request, quickly enacted the Military Commissions Act, emphatically reasserting that it did not want these prisoners filing habeas petitions. It is therefore clear that Congress and the Executive—*both* political branches—have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war that some 190,000 of our men and women are now fighting. As the Solicitor General argued, "the Military Commissions Act and the Detainee Treatment Act . . . represent an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." Brief for Federal Respondents 10–11 (internal quotation marks omitted).

But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." *Ante*, at 769. "The Government," it declares, "presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." *Ibid.* What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.

II

A

The Suspension Clause of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be sus-

pended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, §9, cl. 2. As a court of law operating under a written Constitution, our role is to determine whether there is a conflict between that Clause and the Military Commissions Act. A conflict arises only if the Suspension Clause preserves the privilege of the writ for aliens held by the United States military as enemy combatants at the base in Guantanamo Bay, located within the sovereign territory of Cuba.

We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional. See, *e. g.*, *Department of Labor* v. *Triplett*, 494 U. S. 715, 721 (1990); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963); see also *American Communications Assn.* v. *Douds*, 339 U. S. 382, 435 (1950) (Jackson, J., concurring in part and dissenting in part). That is especially so in the area of foreign and military affairs; "perhaps in no other area has the Court accorded Congress greater deference." *Rostker* v. *Goldberg*, 453 U. S. 57, 64–65 (1981). Indeed, we accord great deference even when the President acts alone in this area. See *Department of Navy* v. *Egan*, 484 U. S. 518, 529–530 (1988); *Regan* v. *Wald*, 468 U. S. 222, 243 (1984).

In light of those principles of deference, the Court's conclusion that "the common law [does not] yiel[d] a definite answer to the questions before us," *ante*, at 752, leaves it no choice but to affirm the Court of Appeals. The writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written. See Part III, *infra*. The Court admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States. See *ante*, at 752–754; *Rasul* v. *Bush*, 542 U. S. 466, 500–501 (2004) (SCALIA, J., dissenting). Together, these two concessions establish that it is (in the Court's view) perfectly ambiguous whether the common-law writ would have provided

a remedy for these petitioners. If that is so, the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the co-equal branches.[2]

How, then, does the Court weave a clear constitutional prohibition out of pure interpretive equipoise? The Court resorts to "fundamental separation-of-powers principles" to interpret the Suspension Clause. *Ante*, at 755. According to the Court, because "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers," the test of its extraterritorial reach "must not be subject to manipulation by those whose power it is designed to restrain." *Ante*, at 765, 766.

That approach distorts the nature of the separation of powers and its role in the constitutional structure. The "fundamental separation-of-powers principles" that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth. Only by considering them one-by-one does the full shape of the *Constitution's* separation-of-powers principles emerge. It is nonsensical to interpret those provisions themselves in light of some general "separation-of-powers principles" dreamed up by the Court. Rather, they must be interpreted to mean what they were understood to mean when the people ratified them. And if the understood scope

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[2]The opinion seeks to avoid this straightforward conclusion by saying that the Court has been "careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ." *Ante*, at 746 (citing *INS* v. *St. Cyr*, 533 U. S. 289, 300–301 (2001)). But not foreclosing the possibility that they have expanded is not the same as demonstrating (or at least holding without demonstration, which seems to suffice for today's majority) that they have expanded. The Court must either hold that the Suspension Clause has "expanded" in its application to aliens abroad, or acknowledge that it has no basis to set aside the actions of Congress and the President. It does neither.

of the writ of habeas corpus was "designed to restrain" (as the Court says) the actions of the Executive, the understood *limits* upon that scope were (as the Court seems not to grasp) just as much "designed to restrain" the incursions of the Third Branch. "Manipulation" of the territorial reach of the writ by the Judiciary poses just as much a threat to the proper separation of powers as "manipulation" by the Executive. As I will show below, manipulation is what is afoot here. The understood limits upon the writ deny our jurisdiction over the habeas petitions brought by these enemy aliens, and entrust the President with the crucial wartime determinations about their status and continued confinement.

B

The Court purports to derive from our precedents a "functional" test for the extraterritorial reach of the writ, *ante*, at 764, which shows that the Military Commissions Act unconstitutionally restricts the scope of habeas. That is remarkable because the most pertinent of those precedents, *Johnson* v. *Eisentrager*, 339 U. S. 763, conclusively establishes the opposite. There we were confronted with the claims of 21 Germans held at Landsberg Prison, an American military facility located in the American zone of occupation in postwar Germany. They had been captured in China, and an American military commission sitting there had convicted them of war crimes—collaborating with the Japanese after Germany's surrender. *Id.*, at 765–766. Like petitioners here, the Germans claimed that their detentions violated the Constitution and international law, and sought a writ of habeas corpus. Writing for the Court, Justice Jackson held that American courts lacked habeas jurisdiction:

> "We are cited to *[sic]* no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within

its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.*, at 768.

Justice Jackson then elaborated on the historical scope of the writ:

> "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. . . .
>
> "But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.*, at 770–771.

Lest there be any doubt about the primacy of territorial sovereignty in determining the jurisdiction of a habeas court over an alien, Justice Jackson distinguished two cases in which aliens had been permitted to seek habeas relief, on the ground that the prisoners in those cases were in custody within the sovereign territory of the United States. *Id.*, at 779–780 (discussing *Ex parte Quirin*, 317 U. S. 1 (1942), and *In re Yamashita*, 327 U. S. 1 (1946)). "By reason of our sovereignty at that time over [the Philippines]," Jackson wrote, "Yamashita stood much as did Quirin before American courts." 339 U. S., at 780.

Eisentrager thus held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.[3]

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[3] In its failed attempt to distinguish *Eisentrager*, the Court comes up with the notion that "*de jure* sovereignty" is simply an additional factor that can be added to (presumably) "*de facto* sovereignty" (*i. e.*, practical control) to determine the availability of habeas for aliens, but that it is not a necessary factor, whereas *de facto* sovereignty is. It is perhaps in this *de facto* sense, the Court speculates, that *Eisentrager* found "sovereignty"

The Court would have us believe that *Eisentrager* rested on "[p]ractical considerations," such as the "difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding." *Ante*, at 762. Formal sovereignty, says the Court, is merely one consideration "that bears upon which constitutional guarantees apply" in a given location. *Ante*, at 764. This is a sheer rewriting of the case. *Eisentrager* mentioned practical concerns, to be sure—but not for the purpose of determining *under what circumstances* American courts could issue writs of habeas corpus for aliens abroad. It cited them to support *its holding* that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad *in any circumstances*. As Justice Black accurately said in dissent, "the Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared." 339 U. S., at 796.

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lacking. See *ante*, at 755, 763–764. If that were so, one would have expected *Eisentrager* to explain in some detail why the United States did not have practical control over the American zone of occupation. It did not (and probably could not). Of course this novel *de facto-de jure* approach does not explain why the writ never issued to Scotland, which was assuredly within the *de facto* control of the English Crown. See *infra*, at 846–847.

To support its holding that *de facto* sovereignty is relevant to the reach of habeas corpus, the Court cites our decision in *Fleming* v. *Page*, 9 How. 603 (1850), a case about the application of a customs statute to a foreign port occupied by U. S. forces. See *ante*, at 754. The case used the phrase "subject to the sovereignty and dominion of the United States" to refer to the United States' practical control over a "foreign country." 9 How., at 614. But *Fleming* went on to explain that because the port remained part of the "enemy's country," even though under U. S. military occupation, "its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws." *Id.*, at 618. If *Fleming* is relevant to these cases at all, it undermines the Court's holding.

The Court also tries to change *Eisentrager* into a "functional" test by quoting a paragraph that lists the characteristics of the German petitioners:

> "To support [the] assumption [of a constitutional right to habeas corpus] we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." *Id.*, at 777 (quoted in part, *ante*, at 766).

But that paragraph is introduced by a sentence stating that "[t]he foregoing demonstrates *how much further we must go* if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts." 339 U. S., at 777 (emphasis added). How much further than *what?* Further than the rule set forth in the prior section of the opinion, which said that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.*, at 771. In other words, the characteristics of the German prisoners were set forth, not in application of some "functional" test, but to show that the case before the Court represented an *a fortiori* application of the ordinary rule. That is reaffirmed by the sentences that immediately follow the listing of the Germans' characteristics:

> "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here,

> for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.*, at 777–778.

Eisentrager nowhere mentions a "functional" test, and the notion that it is based upon such a principle is patently false.[4]

The Court also reasons that *Eisentrager* must be read as a "functional" opinion because of our prior decisions in the Insular Cases. See *ante*, at 756–759. It cites our statement in *Balzac* v. *Porto Rico*, 258 U. S. 298, 312 (1922), that "'the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and require-

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[4]JUSTICE SOUTER's concurrence relies on our decision four Terms ago in *Rasul* v. *Bush*, 542 U. S. 466 (2004), where the Court interpreted the habeas statute to extend to aliens held at Guantanamo Bay. He thinks that "no one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases." *Ante*, at 799. But *Rasul* was devoted primarily to an explanation of why *Eisentrager*'s statutory holding no longer controlled given our subsequent decision in *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973). See *Rasul*, 542 U. S., at 475–479. And the opinion of the Court today—which JUSTICE SOUTER joins—expressly rejects the historical evidence cited in *Rasul* to support its conclusion about the reach of habeas corpus. Compare *id.*, at 481–482, with *ante*, at 748. Moreover, even if one were to accept as true what JUSTICE SOUTER calls *Rasul*'s "well-considered" dictum, that does not explain why *Eisentrager*'s constitutional holding must be overruled or how it can be distinguished. (After all, *Rasul* distinguished *Eisentrager*'s statutory holding on a ground inapplicable to its constitutional holding.) In other words, even if the Court were to conclude that *Eisentrager*'s rule was incorrect as an original matter, the Court would have to explain the justification for departing from that precedent. It therefore cannot possibly be true that *Rasul* controls these cases, as JUSTICE SOUTER suggests.

ments.'" *Ante*, at 758. But the Court conveniently omits *Balzac*'s predicate to that statement: "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the *sovereign power* of that government is exerted." 258 U. S., at 312 (emphasis added). The Insular Cases all concerned Territories acquired by Congress under its Article IV authority and indisputably part of the sovereign territory of the United States. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 268 (1990); *Reid* v. *Covert*, 354 U. S. 1, 13 (1957) (plurality opinion of Black, J.). None of the Insular Cases stands for the proposition that aliens located outside U. S. sovereign territory have constitutional rights, and *Eisentrager* held just the opposite with respect to habeas corpus. As I have said, *Eisentrager* distinguished *Yamashita* on the ground of "our sovereignty [over the Philippines]," 339 U. S., at 780.

The Court also relies on the "[p]ractical considerations" that influenced our decision in *Reid* v. *Covert*, *supra*. See *ante*, at 759–762. But all the Justices in the majority except Justice Frankfurter limited their analysis to the rights of *citizens* abroad. See *Reid*, 354 U. S., at 5–6 (plurality opinion of Black, J.); *id.*, at 74–75 (Harlan, J., concurring in result). (Frankfurter limited his analysis to the even narrower class of civilian dependents of American military personnel abroad, see *id.*, at 45 (opinion concurring in result).) In trying to wring some kind of support out of *Reid* for today's novel holding, the Court resorts to a chain of logic that does not hold. The members of the *Reid* majority, the Court says, were divided over whether *In re Ross*, 140 U. S. 453 (1891), which had (according to the Court) held that under certain circumstances American citizens abroad do not have indictment and jury-trial rights, should be overruled. In the Court's view, the *Reid* plurality would have overruled *Ross*, but Justices Frankfurter and Harlan preferred to distinguish it. The upshot: "If citizenship had been the only relevant factor in the case, it would have been necessary for

the Court to overturn *Ross*, something Justices Harlan and Frankfurter were unwilling to do." *Ante*, at 761–762. What, exactly, is this point supposed to prove? To say that "practical considerations" determine the precise content of the constitutional protections American citizens enjoy when they are abroad is quite different from saying that "practical considerations" determine whether aliens abroad enjoy any constitutional protections whatever, including habeas. In other words, merely because citizenship is not a *sufficient* factor to extend constitutional rights abroad does not mean that it is not a *necessary* one.

The Court tries to reconcile *Eisentrager* with its holding today by pointing out that in postwar Germany, the United States was "answerable to its Allies" and did not "pla[n] a long-term occupation." *Ante*, at 768. Those factors were not mentioned in *Eisentrager*. Worse still, it is impossible to see how they relate to the Court's asserted purpose in creating this "functional" test—namely, to ensure a judicial inquiry into detention and prevent the political branches from acting with impunity. Can it possibly be that the Court trusts the political branches more when they are beholden to foreign powers than when they act alone?

After transforming the *a fortiori* elements discussed above into a "functional" test, the Court is still left with the difficulty that most of those elements exist here as well with regard to all the detainees. To make the application of the newly crafted "functional" test produce a different result in the present cases, the Court must rely upon factors (d) and (e): The Germans had been tried by a military commission for violations of the laws of war; the present petitioners, by contrast, have been tried by a Combatant Status Review Tribunal (CSRT) whose procedural protections, according to the Court's *ipse dixit*, "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." *Ante*, at 767. But no one looking for "functional" equivalents would put *Eisentrager* and the pres-

ent cases in the same category, much less place the present cases in a preferred category. The difference between them cries out for lesser procedures in the present cases. The prisoners in *Eisentrager* were *prosecuted* for crimes after the cessation of hostilities; the prisoners here are enemy combatants *detained* during an ongoing conflict. See *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 538 (2004) (plurality opinion) (suggesting, as an adequate substitute for habeas corpus, the use of a tribunal akin to a CSRT to authorize the detention of *American citizens* as enemy combatants during the course of the present conflict).

The category of prisoner comparable to these detainees are not the *Eisentrager* criminal defendants, but the more than 400,000 prisoners of war detained in the United States alone during World War II. Not a single one was accorded the right to have his detention validated by a habeas corpus action in federal court—and that despite the fact that they were present on U. S. soil. See Bradley, The Military Commissions Act, Habeas Corpus, and the Geneva Conventions, 101 Am. J. Int'l L. 322, 338 (2007). The Court's analysis produces a crazy result: Whereas those convicted and sentenced to death for war crimes are without judicial remedy, all enemy combatants detained during a war, at least insofar as they are confined in an area away from the battlefield over which the United States exercises "absolute and indefinite" control, may seek a writ of habeas corpus in federal court. And, as an even more bizarre implication from the Court's reasoning, those prisoners whom the military plans to try by full-dress Commission at a future date may file habeas petitions and secure release before their trials take place.

There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U. S. sovereign territory, see *Verdugo-Urquidez*, *supra*, at 271, and *Eisentrager* could not be clearer that the privilege of habeas corpus does not extend to aliens abroad. By blatantly distorting *Eisentrager*, the Court avoids the difficulty of ex-

plaining why it should be overruled. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992) (identifying *stare decisis* factors). The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice; if anything, it is the Court's "functional" test that does not (and never will) provide clear guidance for the future. *Eisentrager* forms a coherent whole with the accepted proposition that aliens abroad have no substantive rights under our Constitution. Since it was announced, no relevant factual premises have changed. It has engendered considerable reliance on the part of our military. And, as the Court acknowledges, text and history do not clearly compel a contrary ruling. It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.

C

What drives today's decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy. The Court says that if the extraterritorial applicability of the Suspension Clause turned on formal notions of sovereignty, "it would be possible for the political branches to govern without legal constraint" in areas beyond the sovereign territory of the United States. *Ante*, at 765. That cannot be, the Court says, because it is the duty of this Court to say what the law is. *Ibid.* It would be difficult to imagine a more question-begging analysis. "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies *properly before them*." *United States* v. *Raines*, 362 U. S. 17, 20–21 (1960) (citing *Marbury* v. *Madison*, 1 Cranch 137 (1803); emphasis added). Our power "to say what the law is" is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555,

573–578 (1992). And that is precisely the question in these cases: whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise we would not be supreme.

But so long as there are *some* places to which habeas does not run—so long as the Court's new "functional" test will not be satisfied *in every case*—then there will be circumstances in which "it would be possible for the political branches to govern without legal constraint." Or, to put it more impartially, areas in which the legal determinations of the *other* branches will be (shudder!) *supreme*. In other words, judicial supremacy is not really assured by the constitutional rule that the Court creates. The gap between rationale and rule leads me to conclude that the Court's ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world. The "functional" test usefully evades the precedential landmine of *Eisentrager* but is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.

III

Putting aside the conclusive precedent of *Eisentrager*, it is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad, as Judge Randolph's thorough opinion for the court below detailed. See 476 F. 3d 981, 988–990 (CADC 2007).

The Suspension Clause reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, §9, cl. 2. The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people. See, *e. g.*, *Crawford* v. *Washington*, 541 U. S. 36, 54 (2004). That course is especially demanded when (as here) the Constitution limits the power of Congress to infringe

upon a pre-existing common-law right. The nature of the writ of habeas corpus that cannot be suspended must be defined by the common-law writ that was available at the time of the founding. See *McNally* v. *Hill*, 293 U. S. 131, 135–136 (1934); see also *INS* v. *St. Cyr*, 533 U. S. 289, 342 (2001) (SCALIA, J., dissenting); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 471, n. 9 (1942) (Jackson, J., concurring).

It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown. To be sure, the writ had an "extraordinary territorial ambit," because it was a so-called "prerogative writ," which, unlike other writs, could extend beyond the realm of England to other places where the Crown was sovereign. R. Sharpe, The Law of Habeas Corpus 188 (2d ed. 1989) (hereinafter Sharpe); see also Note on the Power of the English Courts to Issue the Writ of Habeas to Places Within the Dominions of the Crown, But Out of England, and On the Position of Scotland in Relation to that Power, 8 Jurid. Rev. 157 (1896) (hereinafter Note on Habeas); *King* v. *Cowle*, 2 Burr. 834, 855–856, 97 Eng. Rep. 587, 599 (K. B. 1759).

But prerogative writs could not issue to foreign countries, even for British subjects; they were confined to the King's dominions—those areas over which the Crown was sovereign. See Sharpe 188; 2 R. Chambers, A Course of Lectures on the English Law 1767–1773, pp. 7–8 (T. Curley ed. 1986); 3 W. Blackstone, Commentaries on the Laws of England 131 (1768) (hereinafter Blackstone). Thus, the writ has never extended to Scotland, which, although united to England when James I succeeded to the English throne in 1603, was considered a foreign dominion under a different Crown—that of the King of Scotland. Sharpe 191; Note on Habeas 158.[5] That is why Lord Mansfield wrote that "[t]o foreign dominions, which belong to a prince who succeeds to the throne of

[5]My dissent in *Rasul* v. *Bush*, 542 U. S. 466, 503 (2004), mistakenly included Scotland among the places to which the writ could run.

England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland . . . ." *Cowle*, *supra*, at 856, 97 Eng. Rep., at 599–600.

The common-law writ was codified by the Habeas Corpus Act of 1679, which "stood alongside Magna Charta and the English Bill of Rights of 1689 as a towering common law lighthouse of liberty—a beacon by which framing lawyers in America consciously steered their course." Amar, Sixth Amendment First Principles, 84 Geo. L. J. 641, 663 (1996). The writ was established in the Colonies beginning in the 1690's and at least one colony adopted the 1679 Act almost verbatim. See Dept. of Political Science, Okla. State Univ., Research Reports, No. 1, R. Walker, The American Reception of the Writ of Liberty 12–16 (1961). Section XI of the Act stated where the writ could run. It "may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, and the islands of *Jersey* or *Guernsey*." 31 Car. 2, ch. 2. The cinque-ports and counties palatine were so-called "exempt jurisdictions"—franchises granted by the Crown in which local authorities would manage municipal affairs, including the court system, but over which the Crown maintained ultimate sovereignty. See 3 Blackstone 78–79. The other places listed—Wales, Berwick-upon-Tweed, Jersey, and Guernsey—were territories of the Crown even though not part of England proper. See *Cowle*, *supra*, at 853–854, 97 Eng. Rep., at 598 (Wales and Berwick-upon-Tweed); 1 Blackstone 104 (Jersey and Guernsey); Sharpe 192 (same).

The Act did not extend the writ elsewhere, even though the existence of other places to which British prisoners could be sent was recognized by the Act. The possibility of evading judicial review through such spiriting-away was eliminated, not by expanding the writ abroad, but by forbidding (in Section XII of the Act) the shipment of prisoners to places where the writ did not run or where its execution

would be difficult. See 31 Car. 2, ch. 2; see generally Nutting, The Most Wholesome Law—The Habeas Corpus Act of 1679, 65 Am. Hist. Rev. 527 (1960).

The Habeas Corpus Act, then, confirms the consensus view of scholars and jurists that the writ did not run outside the sovereign territory of the Crown. The Court says that the idea that "jurisdiction followed the King's officers" is an equally credible view. *Ante*, at 746. It is not credible at all. The only support the Court cites for it is a page in Boumediene's brief, which in turn cites this Court's dicta in *Rasul*, 542 U. S., at 482, mischaracterizing Lord Mansfield's statement that the writ ran to any place that was "under the subjection of the Crown," *Cowle*, *supra*, at 856, 97 Eng. Rep., at 599. It is clear that Lord Mansfield was saying that the writ extended outside the realm of England proper, not outside the sovereign territory of the Crown.[6]

The Court dismisses the example of Scotland on the grounds that Scotland had its own judicial system and that the writ could not, as a practical matter, have been enforced there. *Ante*, at 750. Those explanations are totally unpersuasive. The existence of a separate court system was never a basis for denying the power of a court to issue the writ. See 9 W. Holdsworth, A History of English Law 124, and n. 6 (3d ed. 1944) (citing *Ex parte Anderson*, 3 El. and El. 487, 121 Eng. Rep. 525 (K. B. 1861)). And as for logistical problems, the same difficulties were present for places like the Channel Islands, where the writ did run. The Court attempts to draw an analogy between the prudential limitations on issuing the writ to such remote areas within the sovereign territory of the Crown and the jurisdictional prohibition on issuing the writ to Scotland. See *ante*, at 749–750. But the very authority that the Court cites, Lord

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[6]The dicta in *Rasul* also cited *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), but as I explained in dissent, "[e]ach judge [in *Mwenya*] made clear that the detainee's status as a subject was material to the resolution of the case," 542 U. S., at 504.

Mansfield, expressly distinguished between these two concepts, stating that English courts had the "power" to send the writ to places within the Crown's sovereignty, the "only question" being the "propriety," while they had "no power to send any writ of any kind" to Scotland and other "foreign dominions." *Cowle*, 2 Burr., at 856, 97 Eng. Rep., at 599–600. The writ did not run to Scotland because, even after the Union, "Scotland remained a foreign dominion of the prince who succeeded to the English throne," and "union did not extend the prerogative of the English crown to Scotland." Sharpe 191; see also Sir Matthew Hale's The Prerogatives of the King 19 (D. Yale ed. 1976).[7]

In sum, *all* available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown. Despite three opening briefs, three reply briefs, and support from a legion of *amici*, petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to jurisdiction. The Court finds it significant that there is no recorded case *denying* jurisdiction to such prisoners either. See *ante*, at 752. But a case standing for the remarkable proposition that the writ could issue to a foreign land would surely have been reported, whereas a case denying such a writ for lack of jurisdiction would likely not. At a minimum, the absence of a reported case either way leaves unrefuted the voluminous

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[7] The Court also argues that the fact that the writ could run to Ireland, even though it was ruled under a "separate" crown, shows that formal sovereignty was not the touchstone of habeas jurisdiction. *Ante*, at 751. The passage from Blackstone that the Court cites, however, describes Ireland as "a dependent, subordinate kingdom" that was part of the "king's dominions." 1 Blackstone 98, 100 (internal quotation marks omitted). And Lord Mansfield's opinion in *Cowle* plainly understood Ireland to be "a dominion of the Crown of England," in contrast to the "foreign dominio[n]" of Scotland, and thought that distinction dispositive of the question of habeas jurisdiction. 2 Burr., at 856, 97 Eng. Rep., at 599–600.

commentary stating that habeas was confined to the dominions of the Crown.

What history teaches is confirmed by the nature of the limitations that the Constitution places upon suspension of the common-law writ. It can be suspended only "in Cases of Rebellion or Invasion." Art. I, § 9, cl. 2. The latter case (invasion) is plainly limited to the territory of the United States; and while it is conceivable that a rebellion could be mounted by American citizens abroad, surely the overwhelming majority of its occurrences would be domestic. If the extraterritorial scope of habeas turned on flexible, "functional" considerations, as the Court holds, why would the Constitution limit its suspension almost entirely to instances of domestic crisis? Surely there is an even greater justification for suspension in foreign lands where the United States might hold prisoners of war during an ongoing conflict. And correspondingly, there is less threat to liberty when the Government suspends the writ's (supposed) application in foreign lands, where even on the most extreme view prisoners are entitled to fewer constitutional rights. It makes no sense, therefore, for the Constitution generally to forbid suspension of the writ abroad if indeed the writ has application there.

It may be objected that the foregoing analysis proves too much, since this Court has already suggested that the writ of habeas corpus *does* run abroad for the benefit of United States citizens. "[T]he position that United States citizens throughout the world may be entitled to habeas corpus rights . . . is precisely the position that this Court adopted in *Eisentrager*, see 339 U. S., at 769–770, even while holding that aliens abroad did not have habeas corpus rights." *Rasul*, *supra*, at 501, 502 (SCALIA, J., dissenting) (emphasis deleted). The reason for that divergence is not difficult to discern. The common-law writ, as received into the law of the new constitutional Republic, took on such changes as were demanded by a system in which rule is derived from

the consent of the governed, and in which citizens (not "subjects") are afforded defined protections against the Government. As Justice Story wrote for the Court:

> "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness* v. *Pacard*, 2 Pet. 137, 144 (1829).

See also Hall, The Common Law: An Account of its Reception in the United States, 4 Vand. L. Rev. 791 (1951). It accords with that principle to say, as the plurality opinion said in *Reid:* "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." 354 U. S., at 6; see also *Verdugo-Urquidez*, 494 U. S., at 269–270. On that analysis, "[t]he distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.*, at 275 (KENNEDY, J., concurring).

In sum, because I conclude that the text and history of the Suspension Clause provide no basis for our jurisdiction, I would affirm the Court of Appeals even if *Eisentrager* did not govern these cases.

* * *

Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable "functional" test for the extraterritorial reach of habeas corpus (and, no doubt,

for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in *Johnson* v. *Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

Syllabus

REPUBLIC OF PHILIPPINES ET AL. *v.* PIMENTEL, TEMPORARY ADMINISTRATOR OF ESTATE OF PIMENTEL, DECEASED, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–1204. Argued March 17, 2008—Decided June 12, 2008

A class action by and for human rights victims (Pimentel class) of Ferdinand Marcos, while he was President of the Republic of the Philippines (Republic), led to a nearly $2 billion judgment in a United States District Court. The Pimentel class then sought to attach the assets of Arelma, S. A. (Arelma), a company incorporated by Marcos, held by a New York broker (Merrill Lynch). The Republic and a Philippine commission (Commission) established to recover property wrongfully taken by Marcos are also attempting to recover this and other Marcos property. The Philippine National Bank (PNB) holds some of the disputed assets in escrow, awaiting the outcome of pending litigation in the Sandiganbayan, a Philippine court determining whether Marcos' property should be forfeited to the Republic. Facing claims from various Marcos creditors, including the Pimentel class, Merrill Lynch filed this interpleader action under 28 U. S. C. § 1335, naming, among the defendants, the Republic, the Commission, Arelma, PNB (all petitioners here), and the Pimentel class (respondents here). The Republic and the Commission asserted sovereign immunity under the Foreign Sovereign Immunities Act of 1976, and moved to dismiss pursuant to Federal Rule of Civil Procedure 19(b), arguing that the action could not proceed without them. Arelma and PNB also sought a Rule 19(b) dismissal. The District Court refused, but the Ninth Circuit reversed, holding that the Republic and the Commission are entitled to sovereign immunity and are required parties under Rule 19(a), and it entered a stay pending the Sandiganbayan litigation's outcome. Finding that that litigation could not determine entitlement to Arelma's assets, the District Court vacated the stay and ultimately awarded the assets to the Pimentel class. The Ninth Circuit affirmed, holding that dismissal was not warranted under Rule 19(b) because, though the Republic and the Commission were required parties, their claim had so little likelihood of success on the merits that the action could proceed without them. The court found it unnecessary to consider whether prejudice to those entities might be lessened by a judgment or interim decree in the interpleader action, found the entities' failure to obtain a judgment in the Sandiganbayan an

equitable consideration counseling against dismissing the interpleader suit, and found that allowing the interpleader case to proceed would serve the Pimentel class' interests.

Held:

1. Because Arelma and PNB also seek review of the Ninth Circuit's decision, this Court need not rule on the question whether the Republic and the Commission, having been dismissed from the suit, had the right to seek review of the decision that the suit could proceed in their absence. As a general matter any party may move to dismiss an action under Rule 19(b). Arelma and PNB have not lost standing to have the judgment vacated in its entirety on procedural grounds simply because they did not appeal, or petition for certiorari on, the underlying merits ruling denying them the interpleaded assets. Pp. 861–862.

2. Rule 19 requires dismissal of the interpleader action. Pp. 862–873.

(a) Under Rule 19(a), nonjoinder even of a required person does not always result in dismissal. When joinder is not feasible, the question whether an action should proceed turns on nonexclusive considerations in Rule 19(b), which asks whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." The joinder issue can be complex, and the case-specific determinations involve multiple factors, some "substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests," *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 119. Pp. 862–863.

(b) Here, Rule 19(a)'s application is not contested: The Republic and the Commission are required entities. And this Court need not decide the proper standard of review for Rule 19(b) decisions, because the Ninth Circuit's errors of law require reversal. Pp. 863–873.

(1) The first factor directs the court to consider, in determining whether the action may proceed, the prejudice to absent entities and present parties in the event judgment is rendered without joinder. Rule 19(b)(1). The Ninth Circuit gave insufficient weight to the sovereign status of the Republic and the Commission in considering whether they would be prejudiced if the case proceeded. Giving full effect to sovereign immunity promotes the comity and dignity interests that contributed to the development of the immunity doctrine. See, *e. g.*, *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486. These interests are concrete here. The entities' claims arise from historically and politically significant events for the Republic and its people, and the entities have a unique interest in resolving matters related to Arelma's assets. A foreign state has a comity interest in using its courts for a dispute if it has a right to do so. Its dignity is not enhanced if other nations bypass its courts without right or good cause. A more specific

affront could result if property the Republic and the Commission claim is seized by a foreign court decree. This Court has not considered the precise question presented, but authorities involving the intersection of joinder and the United States' governmental immunity, see, *e. g.*, *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, 373–375, instruct that where sovereign immunity is asserted, and the sovereign's claims are not frivolous, dismissal must be ordered where there is a potential for injury to the absent sovereign's interests. The claims of the Republic and the Commission were not frivolous, and the Ninth Circuit thus erred in ruling on their merits. The privilege of sovereign immunity from suit is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in its absence and over its objection. The Pimentel class' interest in recovering its damages is not discounted, but important comity concerns are implicated by assertion of foreign sovereign immunity. The error is not that the courts below gave too much weight to the Pimentel class' interests, but that they did not accord proper weight to the compelling sovereign immunity claim. Pp. 865–869.

(2) The second factor is the extent to which any prejudice could be lessened or avoided by relief or measures alternative to dismissal, Rule 19(b)(2), but no alternative remedies or forms of relief have been proposed or appear to be available. As to the third factor—whether a judgment rendered without the absent party would be adequate, Rule 19(b)(3)—"adequacy" refers not to satisfaction of the Pimentel class' claims, but to the "public stake in settling disputes by wholes, whenever possible," *Provident Bank*, *supra*, at 111. Going forward with the action in the absence of the Republic and the Commission would not further this public interest because they could not be bound by a judgment to which they were not parties. As to the fourth factor—whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder, Rule 19(b)(4)—the Ninth Circuit made much of the tort victims' lack of an alternative forum. But Merrill Lynch, not the Pimentel class, is the plaintiff as the stakeholder in the interpleader action. See 28 U. S. C. §1335(a). The Pimentel class' interests are not irrelevant to Rule 19(b)'s equitable balance, but the Rule's other provisions are the relevant ones to consult. A dismissal on the ground of nonjoinder will not provide Merrill Lynch with a judgment determining entitlement to the assets so it could be done with the matter, but it likely would give Merrill Lynch an effective defense against piecemeal litigation by various claimants and inconsistent, conflicting judgments. Any prejudice to Merrill Lynch is outweighed by prejudice to the absent entities invoking sovereign immunity. In the usual course, the Ninth

Circuit's failure to give sufficient weight to the likely prejudice to the Republic and the Commission would warrant reversal and remand for further determinations, but here, that error plus this Court's analysis under Rule 19(b)'s additional provisions require the action's dismissal. Pp. 869–873.

464 F. 3d 885, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined, in which SOUTER, J., joined as to all but Parts IV–B and V, and in which STEVENS, J., joined as to Part II. STEVENS, J., *post*, p. 875, and SOUTER, J., *post*, p. 879, filed opinions concurring in part and dissenting in part.

Charles A. Rothfeld argued the cause for petitioners. With him on the briefs were *Stephen V. Bomse*, *E. Joshua Rosenkranz*, *Adam J. Gromfin*, *Kenneth S. Geller*, and *David M. Gossett*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Clement*, *Acting Assistant Attorney General Bucholtz*, *Douglas Hallward-Driemeier*, and *Michael S. Raab*.

Robert A. Swift argued the cause for respondents. With him on the brief for respondent Mariano J. Pimentel were *Craig W. Hillwig*, *Sherry P. Broder*, and *Jon M. Van Dyke*.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case turns on the interpretation and proper application of Rule 19 of the Federal Rules of Civil Procedure and requires us to address the Rule's operation in the context of foreign sovereign immunity.

This interpleader action was commenced to determine the ownership of property allegedly stolen by Ferdinand Marcos

*Briefs of *amici curiae* urging affirmance were filed for Philippine Human Rights Groups by *Mark S. Davis;* and for Professors of International Law by *William J. Aceves*.

A. Robert Pietrzak, *Daniel A. McLaughlin*, *Carter G. Phillips*, and *Daniel R. Spector* filed a brief for Merrill Lynch, Pierce, Fenner & Smith Inc. as *amicus curiae*.

when he was the President of the Republic of the Philippines. Two entities named in the suit invoked sovereign immunity. They are the Republic of the Philippines and the Philippine Presidential Commission on Good Governance, referred to in turn as the Republic and the Commission. They were dismissed, but the interpleader action proceeded to judgment over their objection. Together with two parties who remained in the suit, the Republic and the Commission now insist it was error to allow the litigation to proceed. Under Rule 19, they contend, the action should have been dismissed once it became clear they could not be joined as parties without their consent.

The United States Court of Appeals for the Ninth Circuit, agreeing with the District Court, held the action could proceed without the Republic and the Commission as parties. Among the reasons the Court of Appeals gave was that the absent, sovereign entities would not prevail on their claims. We conclude the Court of Appeals gave insufficient weight to the foreign sovereign status of the Republic and the Commission, and that the court further erred in reaching and discounting the merits of their claims.

I

A

When the opinion of the Court of Appeals is consulted, the reader will find its quotations from Rule 19 do not accord with its text as set out here; for after the case was in the Court of Appeals and before it came here, the text of the Rule changed. The Rules Committee advised the changes were stylistic only, see Advisory Committee's Notes on 2007 Amendment to Fed. Rule Civ. Proc. 19, 28 U. S. C., p. 826 (2006 ed., Supp. I); and we agree. These are the three relevant stylistic changes. First, the word "required" replaced the word "necessary" in subparagraph (a). Second, the 1966 Rule set out factors in longer clauses and the 2007 Rule sets out the factors affecting joinder in separate lettered head-

ings. Third, the word "indispensable," which had remained as a remnant of the pre-1966 Rule, is altogether deleted from the current text. Though the word "indispensable" had a lesser place in the 1966 Rule, it still had the latent potential to mislead.

As the substance and operation of the Rule both pre- and post-2007 are unchanged, we will refer to the present, revised version. The pre-2007 version is printed in the appendix to this opinion, *infra*, at 873–875. The current Rule states, in relevant part, as follows:

> "Rule 19. Required Joinder of Parties
>
> "(a) PERSONS REQUIRED TO BE JOINED IF FEASIBLE.
>
> "(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> "(A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> "(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> "(i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> "(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
>
> "(2) *Joinder by Court Order.* If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
>
> "(3) *Venue.* If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

"(b) WHEN JOINDER IS NOT FEASIBLE. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

"(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

"(2) the extent to which any prejudice could be lessened or avoided by:

"(A) protective provisions in the judgment;

"(B) shaping the relief; or

"(C) other measures;

"(3) whether a judgment rendered in the person's absence would be adequate; and

"(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. Rules Civ. Proc. 19(a)–(b), 28 U. S. C.

See also Rule 19(c) (imposing pleading requirements); Rule 19(d) (creating exception for class actions).

B

In 1972, Ferdinand Marcos, then President of the Republic, incorporated Arelma, S. A. (Arelma), under Panamanian law. Around the same time, Arelma opened a brokerage account with Merrill Lynch, Pierce, Fenner & Smith Inc. (Merrill Lynch) in New York, in which it deposited $2 million. As of the year 2000, the account had grown to approximately $35 million.

Alleged crimes and misfeasance by Marcos during his presidency became the subject of worldwide attention and protest. A class action by and on behalf of some 9,539 of his human rights victims was filed against Marcos and his estate, among others. The class action was tried in the United

States District Court for the District of Hawaii and resulted in a nearly $2 billion judgment for the class. See *Hilao* v. *Estate of Marcos*, 103 F. 3d 767 (CA9 1996). We refer to that litigation as the Pimentel case and to its class members as the Pimentel class. In a related action, the Estate of Roger Roxas and Golden Budha *[sic]* Corporation (the Roxas claimants) claim a right to execute against the assets to satisfy their own judgment against Marcos' widow, Imelda Marcos. See *Roxas* v. *Marcos*, 89 Haw. 91, 113–115, 969 P. 2d 1209, 1231–1233 (1998).

The Pimentel class claims a right to enforce its judgment by attaching the Arelma assets held by Merrill Lynch. The Republic and the Commission claim a right to the assets under a 1955 Philippine law providing that property derived from the misuse of public office is forfeited to the Republic from the moment of misappropriation. See An Act Declaring Forfeiture in Favor of the State Any Property Found To Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceedings Therefor, Rep. Act No. 1379, 51:9 O. G. 4457 (June 18, 1955).

After Marcos fled the Philippines in 1986, the Commission was created to recover any property he wrongfully took. Almost immediately the Commission asked the Swiss Government for assistance in recovering assets—including shares in Arelma—that Marcos had moved to Switzerland. In compliance the Swiss Government froze certain assets and, in 1990, that freeze was upheld by the Swiss Federal Supreme Court. In 1991, the Commission asked the Sandiganbayan, a Philippine court of special jurisdiction over corruption cases, to declare forfeited to the Republic any property Marcos had obtained through misuse of his office. That litigation is still pending in the Sandiganbayan.

The Swiss assets were transferred to an escrow account set up by the Commission at the Philippine National Bank (PNB), pending the Sandiganbayan's decision as to their rightful owner. The Republic and the Commission re-

quested that Merrill Lynch follow the same course and transfer the Arelma assets to an escrow account at PNB. Merrill Lynch did not do so. Facing claims from various Marcos creditors, including the Pimentel class, Merrill Lynch instead filed an interpleader action under 28 U. S. C. § 1335. The named defendants in the interpleader action were, among others, the Republic and the Commission, Arelma, PNB, and the Pimentel class (the respondents here).

The Pimentel case had been tried as a class action before Judge Manuel Real of the United States District Court for the Central District of California, who was sitting by designation in the District of Hawaii after the Judicial Panel on Multidistrict Litigation consolidated the various human rights complaints against Marcos in that court. See *Hilao*, *supra*, at 771. Judge Real directed Merrill Lynch to file the interpleader action in the District of Hawaii, and he presided over the matter.

After being named as defendants in the interpleader action, the Republic and the Commission asserted sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. § 1604. They moved to dismiss pursuant to Rule 19(b), based on the premise that the action could not proceed without them. Arelma and PNB also moved to dismiss pursuant to Rule 19(b). Without addressing whether they were entitled to sovereign immunity, Judge Real initially rejected the request by the Republic and the Commission to dismiss the interpleader action. They appealed, and the Court of Appeals reversed. It held the Republic and the Commission are entitled to sovereign immunity and that under Rule 19(a) they are required parties (or "necessary" parties under the old terminology). See *In re Republic of the Philippines*, 309 F. 3d 1143, 1149–1152 (CA9 2002). The Court of Appeals entered a stay pending the outcome of the litigation in the Sandiganbayan over the Marcos assets. See *id.*, at 1152–1153.

After concluding that the pending litigation in the Sandiganbayan could not determine entitlement to the Arelma assets, Judge Real vacated the stay, allowed the action to proceed, and awarded the assets to the Pimentel class. A week later, in the case initiated before the Sandiganbayan in 1991, the Republic asked that court to declare the Arelma assets forfeited, arguing the matter was ripe for decision. The Sandiganbayan has not yet ruled.

In the interpleader case the Republic, the Commission, Arelma, and PNB appealed the District Court's judgment in favor of the Pimentel claimants. This time the Court of Appeals affirmed. See *Merrill Lynch, Pierce, Fenner & Smith* v. *ENC Corp.*, 464 F. 3d 885 (CA9 2006). Dismissal of the interpleader suit, it held, was not warranted under Rule 19(b) because, though the Republic and the Commission were required ("necessary") parties under Rule 19(a), their claim had so little likelihood of success on the merits that the interpleader action could proceed without them. One of the reasons the court gave was that any action commenced by the Republic and the Commission to recover the assets would be barred by New York's 6-year statute of limitations for claims involving the misappropriation of public property. See N. Y. Civ. Prac. Law Ann. §213 (West Supp. 2008). The court thus found it unnecessary to consider whether any prejudice to the Republic and the Commission might be lessened by some form of judgment or interim decree in the interpleader action. The court also considered the failure of the Republic and the Commission to obtain a judgment in the Sandiganbayan—despite the Arelma share certificates having been located and held in escrow at PNB since 1997–1998—to be an equitable consideration counseling against dismissal of the interpleader suit. The court further found it relevant that allowing the interpleader case to proceed would serve the interests of the Pimentel class, which, at this point, likely has no other available forum in

which to enforce its judgment against property belonging to Marcos.

This Court granted certiorari. See 552 U. S. 1061 (2007).

II

We begin with the question we asked the parties to address when we granted certiorari: Whether the Republic and the Commission, having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the District Court's determination under Rule 19 that the action could proceed in their absence; and whether they have the right to seek this Court's review of the Court of Appeals' judgment affirming the District Court. See *ibid.*

Respondents contend that the Republic and the Commission were not proper parties in the Court of Appeals when it reviewed the District Court's judgment allowing the action to proceed without them; and, respondents continue, the Republic and the Commission are not proper parties in the instant proceeding before us. See Brief for Respondent Pimentel 21.

Without implying that respondents are correct in saying the Republic and the Commission could neither appeal nor become parties here, we conclude we need not rule on this point. Other parties before us, Arelma and PNB, also seek review of the Court of Appeals' decision affirming the District Court. They, too, moved to dismiss the action under Rule 19(b), appealed from the denial of their motion, and are petitioners before this Court. As a general matter any party may move to dismiss an action under Rule 19(b). A court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join. See, *e. g.*, *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235 (1902); see also *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 111 (1968).

Respondents argue, however, that Arelma and PNB have no standing to raise before this Court the question whether the action may proceed in the absence of the Republic and the Commission. Arelma and PNB lost on the merits of their underlying claims to the interpleaded assets in both the District Court and the Court of Appeals. By failing to petition for certiorari on that merits ruling, respondents contend, Arelma and PNB abandoned any entitlement to the interpleaded assets and therefore lack a concrete stake in the outcome of further proceedings. We disagree. Dismissal of the action under Rule 19(b) would benefit Arelma and PNB by vacating the judgment denying them the interpleaded assets. A party that seeks to have a judgment vacated in its entirety on procedural grounds does not lose standing simply because the party does not petition for certiorari on the substance of the order.

III

We turn to the question whether the interpleader action could proceed in the District Court without the Republic and the Commission as parties.

Subdivision (a) of Rule 19 states the principles that determine when persons or entities must be joined in a suit. The Rule instructs that nonjoinder even of a required person does not always result in dismissal. Subdivision (a) opens by noting that it addresses joinder "if Feasible." Where joinder is not feasible, the question whether the action should proceed turns on the factors outlined in subdivision (b). The considerations set forth in subdivision (b) are nonexclusive, as made clear by the introductory statement that "[t]he factors for the court to consider include." Fed. Rule Civ. Proc. 19(b). The general direction is whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Ibid.* The design of the Rule, then, indicates that the determination

whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations. This is also consistent with the fact that the determination of who may, or must, be parties to a suit has consequences for the persons and entities affected by the judgment; for the judicial system and its interest in the integrity of its processes and the respect accorded to its decrees; and for society and its concern for the fair and prompt resolution of disputes. See, *e. g.*, *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 737–739 (1977). For these reasons, the issue of joinder can be complex, and determinations are case specific. See, *e. g.*, *Provident Bank*, *supra*, at 118–119.

Under the earlier Rules the term "indispensable party" might have implied a certain rigidity that would be in tension with this case-specific approach. The word "indispensable" had an unforgiving connotation that did not fit easily with a system that permits actions to proceed even when some persons who otherwise should be parties to the action cannot be joined. As the Court noted in *Provident Bank*, the use of "indispensable" in Rule 19 created the "verbal anomaly" of an "indispensable person who turns out to be dispensable after all." 390 U. S., at 117, n. 12. Though the text has changed, the new Rule 19 has the same design and, to some extent, the same tension. Required persons may turn out not to be required for the action to proceed after all.

In all events it is clear that multiple factors must bear on the decision whether to proceed without a required person. This decision "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Id.*, at 119.

IV

We turn to Rule 19 as it relates to this case. The application of subdivision (a) of Rule 19 is not contested. The Republic and the Commission are required entities because

"[w]ithout [them] as parties in this interpleader action, their interests in the subject matter are not protected." *In re Republic of Philippines*, 309 F. 3d, at 1152; see Fed. Rule Civ. Proc. 19(a)(1)(B)(i). All parties appear to concede this. The disagreement instead centers around the application of subdivision (b), which addresses whether the action may proceed without the Republic and the Commission, given that the Rule requires them to be parties.

We have not addressed the standard of review for Rule 19(b) decisions. The case-specific inquiry that must be followed in applying the standards set forth in subdivision (b), including the direction to consider whether "in equity and good conscience" the case should proceed, implies some degree of deference to the district court. In this case, however, we find implicit in the District Court's rulings, and explicit in the opinion of the Court of Appeals, errors of law that require reversal. Whatever the appropriate standard of review, a point we need not decide, the judgment could not stand. Cf. *Koon* v. *United States*, 518 U. S. 81, 99–100 (1996) (a court "by definition abuses its discretion when it makes an error of law").

The Court of Appeals erred in not giving the necessary weight to the absent entities' assertion of sovereign immunity. The court in effect decided the merits of the Republic and the Commission's claims to the Arelma assets. Once it was recognized that those claims were not frivolous, it was error for the Court of Appeals to address them on their merits when the required entities had been granted sovereign immunity. The court's consideration of the merits was itself an infringement on foreign sovereign immunity; and, in any event, its analysis was flawed. We discuss these errors first in the context of how they affected the Court of Appeals' analysis under the first factor of Rule 19(b). We then explain that the outcome suggested by the first factor is confirmed by our analysis under the other provisions of Rule 19(b). The action may not proceed.

A

As to the first Rule 19(b) factor—the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties, Fed. Rule Civ. Proc. 19(b)(1)—the judgment of the Court of Appeals is incorrect.

In considering whether the Republic and the Commission would be prejudiced if the action were to proceed in their absence, the Court of Appeals gave insufficient weight to their sovereign status. The doctrine of foreign sovereign immunity has been recognized since early in the history of our Nation. It is premised upon the "perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 137 (1812). The Court has observed that the doctrine is designed to "give foreign states and their instrumentalities some protection from the inconvenience of suit," *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 479 (2003).

The privilege is codified by federal statute. FSIA, 28 U. S. C. §§ 1330, 1602–1611, provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607," absent existing international agreements to the contrary. § 1604; see *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486–489 (1983) (explaining the history of the doctrine's codification). Exceptions to the general principle of foreign sovereign immunity are contained in §§ 1605–1607 of the statute. They are inapplicable here, or at least the parties do not invoke them. Immunity in this case, then, is uncontested; and pursuant to the Court of Appeals' earlier ruling on the issue, the District Court dismissed the Republic and the Commission from the action on this ground.

The District Court and the Court of Appeals failed to give full effect to sovereign immunity when they held the action could proceed without the Republic and the Commission.

Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine. See, *e. g.*, *id.*, at 486 ("[F]oreign sovereign immunity is a matter of grace and comity"); *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 362, and n. 7 (1955) (foreign sovereign immunity derives from "standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign" (citing *Schooner Exchange*, *supra*, at 136–137, 143–144)).

Comity and dignity interests take concrete form in this case. The claims of the Republic and the Commission arise from events of historical and political significance for the Republic and its people. The Republic and the Commission have a unique interest in resolving the ownership of or claims to the Arelma assets and in determining if, and how, the assets should be used to compensate those persons who suffered grievous injury under Marcos. There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause. Then, too, there is the more specific affront that could result to the Republic and the Commission if property they claim is seized by the decree of a foreign court. Cf. *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35–36 (1945) (pre-FSIA, common-law doctrine dictated that courts defer to executive determination of immunity because "[t]he judicial seizure" of the property of a friendly state may be regarded as "an affront to its dignity and may . . . affect our relations with it").

Though this Court has not considered a case posing the precise question presented here, there are some authorities involving the intersection of joinder and the governmental immunity of the United States. See, *e. g.*, *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, 373–375 (1945) (dismissing an action where the Under Secretary of the Navy

was sued in his official capacity, because the Government was a required entity that could not be joined when it withheld consent to be sued); *Minnesota* v. *United States*, 305 U. S. 382, 386–388 (1939) (dismissing the action for nonjoinder of a required entity where the United States was the owner of the land in question but had not consented to suit). The analysis of the joinder issue in those cases was somewhat perfunctory, but the holdings were clear: A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.

The Court of Appeals accordingly erred in undertaking to rule on the merits of the Republic and the Commission's claims. There may be cases where the person who is not joined asserts a claim that is frivolous. In that instance a court may have leeway under both Rule 19(a)(1), defining required parties, and Rule 19(b), addressing when a suit may go forward nonetheless, to disregard the frivolous claim. Here, the claims of the absent entities are not frivolous; and the Court of Appeals should not have proceeded on the premise that those claims would be determined against the sovereign entities that asserted immunity.

The Court of Appeals determined that the claims of the Republic and the Commission as to the assets would not succeed because a suit would be time barred in New York. This is not necessarily so. If the Sandiganbayan rules that the Republic owns the assets or stock of Arelma because Marcos did not own them and the property was forfeited to the Republic under Philippine law, then New York misappropriation rules might not be the applicable law. For instance, the Republic and the Commission, standing in for Arelma based upon the Sandiganbayan's judgment, might not pursue a misappropriation of public property suit, as the Court of Appeals assumed they would. They might instead, or in the

alternative, file suit for breach of contract against Merrill Lynch. They would argue the statute of limitations would start to run if and when Merrill Lynch refused to hand over the assets. See N. Y. Civ. Prac. Law Ann. §213 (West Supp. 2008); *Ely-Cruikshank Co.* v. *Bank of Montreal*, 81 N. Y. 2d 399, 402, 615 N. E. 2d 985, 986 (1993) ("In New York, a breach of contract cause of action accrues at the time of the breach"). Or the Republic and the Commission might bring an action either in state or federal court to enforce the Sandiganbayan's judgment. See 1 Restatement (Third) of Foreign Relations Law of the United States §482, Comment *a* (1986) (jurisdiction of foreign court rendering judgment is presumed); *id.*, Comment *d* (providing exceptions not relevant here); see also 28 U. S. C. §2467(c) (providing for enforcement of foreign forfeiture judgments in certain circumstances). Merrill Lynch makes arguments why these actions would not succeed, see Brief for Merrill Lynch as *Amicus Curiae* 26–27, to which the Republic, the Commission, and the United States respond, see Reply Brief for Petitioners 14–18; Brief for United States as *Amicus Curiae* 24–28. We need not seek to predict the outcomes. It suffices that the claims would not be frivolous.

As these comments indicate, Rule 19 cannot be applied in a vacuum, and it may require some preliminary assessment of the merits of certain claims. For example, the Rule directs a court, in determining who is a required person, to consider whether complete relief can be afforded in their absence. See Fed. Rule Civ. Proc. 19(a)(1)(A). Likewise, in the Rule 19(b) inquiry, a court must examine, to some extent, the claims presented and the interests likely to be asserted both by the joined parties and the absent entities or persons. Here, however, it was improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity that was entitled by its sovereign status to immunity from suit. That privilege is much diminished if an important and consequential ruling affecting the sover-

eign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection.

As explained above, the decision to proceed in the absence of the Republic and the Commission ignored the substantial prejudice those entities likely would incur. This most directly implicates Rule 19(b)'s first factor, which directs consideration of prejudice both to absent persons and those who are parties. We have discussed the absent entities. As to existing parties, we do not discount the Pimentel class' interest in recovering damages it was awarded pursuant to a judgment. Furthermore, combating public corruption is a significant international policy. The policy is manifested in treaties providing for international cooperation in recovering forfeited assets. See, *e. g.*, United Nations Convention Against Corruption, G. A. Res. 58/4, chs. IV and V, U. N. Doc. A/RES/58/4, pp. 22, 32 (Dec. 11, 2003) (reprinted in 43 I. L. M. 37 (2004)); Treaty on Mutual Legal Assistance in Criminal Matters Art. 16, Nov. 13, 1994, S. Treaty Doc. No. 104–18 (1995). This policy does support the interest of the Pimentel class in recovering damages awarded to it. But it also underscores the important comity concerns implicated by the Republic and the Commission in asserting foreign sovereign immunity. The error is not that the District Court and the Court of Appeals gave too much weight to the interest of the Pimentel class, but that it did not accord proper weight to the compelling claim of sovereign immunity.

Based on these considerations we conclude the District Court and the Court of Appeals gave insufficient weight to the likely prejudice to the Republic and the Commission should the interpleader proceed in their absence.

B

As to the second Rule 19(b) factor—the extent to which any prejudice could be lessened or avoided by relief or measures alternative to dismissal, Fed. Rule Civ. Proc. 19(b)(2)—

there is no substantial argument to allow the action to proceed. No alternative remedies or forms of relief have been proposed to us or appear to be available. See 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1608, pp. 106–110 (3d ed. 2001) (collecting cases using alternative forms of relief, including the granting of money damages rather than specific performance, the use of declaratory judgment, and the direction that payment be withheld pending suits against the absent party). If the Marcos estate did not own the assets, or if the Republic owns them now, the claim of the Pimentel class likely fails; and in all events, if there are equally valid but competing claims, that too would require adjudication in a case where the Republic and the Commission are parties. See *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 534, and n. 16 (1967); *Russell* v. *Clark's Executors*, 7 Cranch 69, 98–99 (1812) (Marshall, C. J.); *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F. 2d 765, 774 (CADC 1986) ("Conflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence" (citing *Williams* v. *Bankhead*, 19 Wall. 563, 570–571 (1874))).

C

As to the third Rule 19(b) factor—whether a judgment rendered without the absent party would be adequate, Fed. Rule Civ. Proc. 19(b)(3)—the Court of Appeals understood "adequacy" to refer to satisfaction of the Pimentel class' claims. But adequacy refers to the "public stake in settling disputes by wholes, whenever possible." *Provident Bank*, 390 U. S., at 111. This "social interest in the efficient administration of justice and the avoidance of multiple litigation" is an interest that has "traditionally been thought to support compulsory joinder of absent and potentially adverse claimants." *Illinois Brick Co.*, 431 U. S., at 737–738. Going forward with the action without the Republic and the Commission would not further the public interest in settling the

dispute as a whole because the Republic and the Commission would not be bound by the judgment in an action where they were not parties.

D

As to the fourth Rule 19(b) factor—whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder, Fed. Rule Civ. Proc. 19(b)(4)—the Court of Appeals made much of what it considered the tort victims' lack of an alternative forum should this action be dismissed. This seems to assume the plaintiff in this interpleader action was the Pimentel class. It is Merrill Lynch, however, that has the statutory status of plaintiff as the stakeholder in the interpleader action.

It is true that, in an interpleader action, the stakeholder is often neutral as to the outcome, while other parties press claims in the manner of a plaintiff. That is insufficient, though, to overcome the statement in the interpleader statute that the stakeholder is the plaintiff. See 28 U. S. C. § 1335(a) (conditioning jurisdiction in part upon whether "the plaintiff has deposited such money or property" at issue with the district court or has "given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper"). We do not ignore that, in context, the Pimentel class (and indeed all interpleader claimants) are to some extent comparable to the plaintiffs in non-interpleader cases. Their interests are not irrelevant to the Rule 19(b) equitable balance; but the other provisions of the Rule are the relevant ones to consult.

Merrill Lynch, as the stakeholder, makes the point that if the action is dismissed it loses the benefit of a judgment allowing it to disburse the assets and be done with the matter. Dismissal of the action, it urges, leaves it without an adequate remedy, for it "could potentially be forced . . . to defend lawsuits by the various claimants in different jurisdictions, possibly leading to inconsistent judgments." Brief for Merrill Lynch as *Amicus Curiae* 14. A dismissal of the

action on the ground of nonjoinder, however, will protect Merrill Lynch in some respects. That disposition will not provide Merrill Lynch with a judgment determining the party entitled to the assets, but it likely would provide Merrill Lynch with an effective defense against piecemeal litigation and inconsistent, conflicting judgments. As matters presently stand, in any later suit against it Merrill Lynch may seek to join the Republic and the Commission and have the action dismissed under Rule 19(b) should they again assert sovereign immunity. Dismissal for nonjoinder to some extent will serve the purpose of interpleader, which is to prevent a stakeholder from having to pay two or more parties for one claim.

Any prejudice to Merrill Lynch in this regard is outweighed by prejudice to the absent entities invoking sovereign immunity. Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity. See, *e. g.*, *Verlinden*, 461 U. S., at 497 ("[I]f a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States").

V

The Court of Appeals' failure to give sufficient weight to the likely prejudice to the Republic and the Commission should the interpleader proceed in their absence would, in the usual course, warrant reversal and remand for further proceedings. In this case, however, that error and our further analysis under the additional provisions of Rule 19(b) lead us to conclude the action must be dismissed. This leaves the Pimentel class, which has waited for years now to be compensated for grievous wrongs, with no immediate way to recover on its judgment against Marcos. And it leaves Merrill Lynch, the stakeholder, without a judgment.

The balance of equities may change in due course. One relevant change may occur if it appears that the Sandiganbayan cannot or will not issue its ruling within a reasonable period of time. Other changes could result when and if there is a ruling. If the Sandiganbayan rules that the Republic and the Commission have no right to the assets, their claims in some later interpleader suit would be less substantial than they are now. If the ruling is that the Republic and the Commission own the assets, then they may seek to enforce a judgment in our courts; or consent to become parties in an interpleader suit, where their claims could be considered; or file in some other forum if they can obtain jurisdiction over the relevant persons. We do note that if Merrill Lynch, or other parties, elect to commence further litigation in light of changed circumstances, it would not be necessary to file the new action in the District Court where this action arose, provided venue and jurisdictional requirements are satisfied elsewhere. The present action, however, may not proceed.

* * *

The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded with instructions to order the District Court to dismiss the interpleader action.

It is so ordered.

APPENDIX

The Court of Appeals issued its decision before the 2007 amendments to Rule 19(b) became effective. See *Merrill Lynch, Pierce, Fenner & Smith* v. *ENC Corp.*, 464 F. 3d 885, 891 (CA9 2006). The text of the Rule before those changes were adopted is as follows:

> **"Rule 19. Joinder of Persons Needed for Just Adjudication**
>
> "(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder

will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

"(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined.

"(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23." Fed. Rule Civ. Proc., 28 U. S. C.

JUSTICE STEVENS, concurring in part and dissenting in part.

While I join Part II of the Court's opinion holding that we have jurisdiction to review the Court of Appeals' decision and agree that we should not affirm the Court of Appeals' judgment on the merits of its analysis under Rule 19 of the Federal Rules of Civil Procedure, I believe the appropriate disposition of this case is to reverse and remand for further proceedings. The District Court and the Ninth Circuit erred by concluding that the New York statute of limitations provides a virtually insuperable obstacle to petitioners' recovery of the Arelma, S. A., assets, and I therefore agree that this Court should reverse. I would not, however, give near-dispositive effect to the Republic of the Philippines (Republic) and the Philippine Presidential Commission on Good Governance's (Commission) status as sovereign entities, as the Court does in ordering outright dismissal of the case.

In my judgment, the Court of Appeals should either order the District Judge to stay further proceedings pending a reasonably prompt decision of the Sandiganbayan or order the case reassigned to a different District Judge to conduct further proceedings. There is, of course, a risk of unfairness in conducting such proceedings without the participation of petitioners. But it is a risk that they can avoid by waiving their sovereign immunity, and the record provides a basis for believing that they would do so if the case proceeded before a different judge.

The Republic did not invoke its sovereign immunity until after the District Court denied its motion seeking dismissal or transfer for improper venue, dismissal on act of state grounds, or recusal of the District Judge. App. 9; *id.*, at 2–3 (docket entries). In support of that motion they advanced a factual basis for suspecting that the District Judge's impartiality could be questioned. Memorandum of Law in Support of the Motions To Dismiss, Transfer or Stay, and for Recusal in Civ. No. CV00–595MLR (D. Haw.), pp. 23–28. These facts demonstrate that the District Judge would likely "have substantial difficulty in putting out of his or her mind previously-expressed views." *California* v. *Montrose Chemical Corp. of California*, 104 F. 3d 1507, 1521 (CA9 1997) (providing the standard for when the Ninth Circuit will reassign a case (internal quotation marks omitted)).

It appears, for example, that the District Judge summoned an attorney representing Merrill Lynch to a meeting in chambers in Los Angeles on September 11, 2000, after learning that the Republic and the Commission sought to obtain the Arelma funds from Merrill Lynch. During these proceedings, the District Judge directed Merrill Lynch to file an interpleader action before him in the District of Hawaii and to deposit the Arelma funds with the court, despite the attorney's argument that New York would likely be the more appropriate forum. See *ante*, at 859; Tr. 6 (Sept. 11, 2000). Merrill Lynch filed the interpleader on September 14, 2000, and the District Judge sealed the file, making it difficult for other parties to determine the status of the proceedings. See Affidavit of Richard A. Martin in Support of the Motions To Dismiss, Transfer or Stay Submitted by the Republic of the Philippines and the Presidential Commission on Good Government in Civ. No. CV00–595MLR (D. Haw.), ¶¶ 6–7, 11. These actions bespeak a level of personal involvement and desire to control the Marcos proceedings that create at least a colorable basis for the Republic and the Commission's concern about the District Judge's impartiality.

Furthermore, following the Republic and the Commission's motion to dismiss the action on sovereign immunity grounds, the District Judge decided that they were not "real parties in interest." See *In re Republic of Philippines*, 309 F. 3d 1143, 1148 (CA9 2002). The Ninth Circuit reversed and directed the District Judge to enter a stay, *id.*, at 1153; the District Court did so, but vacated the stay within months. While the District Court's decision to do so was not without some basis, it presumably increased concern about the possibility that the District Judge would not fairly consider the Republic's position on the merits.

Upon reassignment, the question whether to dismiss the case, to stay the proceedings, or to require the Republic to choose between asserting its sovereign immunity and defending on the merits would be open. The District Judge might wish to hold a hearing to determine whether the Republic and the Commission have a substantial argument that the Republic owned the disputed assets when they were conveyed to Arelma in 1972. While the Court assumes that the Republic's interest in the Arelma assets is "not frivolous," *ante*, at 867, on this record, it is not clear whether the Republic has a sufficient claim to those assets to preclude their recovery by judgment creditors of Marcos. The Republic's claim to disputed assets may be meritless for reasons unrelated to the potential statute of limitations.

Further, in conducting the balancing inquiry mandated by Rule 19, as interpreted by Justice Harlan's opinion for the Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102 (1968), I would conclude that several facts specific to this case suggest that the Republic and the Commission's sovereign interests should be given less weight than in the ordinary case. First, in all events, the Republic and the Commission must take affirmative steps in United States courts (or possibly invoke the assistance of the Attorney General to do so, see Brief for United States as *Amicus Curiae* 27) *at some point* in order to recover the assets held

in the United States. Thus, the sovereign interest implicated here is not of the same magnitude as when a sovereign faces liability; the Republic's interest is in choosing the most convenient venue and time for the suit to proceed.

Second, in the past two decades, the Republic has participated in other proceedings involving Marcos' assets in our courts without interposing any objection. Indeed, in 1987 it filed an *amicus* brief with the Ninth Circuit in the underlying consolidated class action that led to the entry of respondents' judgment against Marcos; in that brief the Republic urged the Ninth Circuit to reverse the District Judge's dismissal of two of the cases (later consolidated) under the act of state doctrine and "to allow the Plaintiffs in those two cases to present their evidence of gross human rights violations against Ferdinand Marcos and to pursue justice in U. S. District Court." App. A to Brief for Respondent Pimentel RA–1.

This was the Republic's position notwithstanding the fact that any recovery would come from a judgment against Marcos' assets—assets that the Republic and the Commission now claim to have owned in full from the moment Marcos acquired them. See, *e. g.*, Brief for Republic in Nos. 04–16401 etc. (CA9), p. 9 ("Under Philippine law, assets resulting from the misuse of public office, bribery, corruption, and other such crimes by public officials are forfeit to the Republic from the moment such assets are generated"); Pet. for Republic in No. 0141 (Sandiganbayan) (filed 1991) (seeking forfeiture of a large number of Marcos assets). Even if the Republic believed that Marcos might have some personal assets that were not ill gotten, under the Republic's theory that amount could not possibly have approached the judgment respondents received. Either the Republic was encouraging futile and purely symbolic litigation, or the Republic believed that other creditors would have access to at least a portion of Marcos' vast assets.

In sum, I am persuaded that the Court's judgment today represents a more "inflexible approach" than the Rule contemplates. *Provident*, 390 U. S., at 107. All parties have an interest in the prompt resolution of the disposition of the Arelma assets. A remand would allow a new judge to handle the matter in an expeditious fashion rather than requiring a brand new proceeding. The Court suggests that Merrill Lynch may file in another District Court—presumably in New York—if it seeks to commence further litigation. See *ante*, at 873. While this solution would put the matter before another District Judge, it requires the initiation of a new proceeding that may unnecessarily delay the final resolution.

Accordingly, I respectfully dissent.

JUSTICE SOUTER, concurring in part and dissenting in part.

I join all but Parts IV–B and V of the Court's opinion. I differ as to relief because a conclusion of the matter pending before the Sandiganbayan may simplify the issues raised in this case and render one disposition or another more clearly correct. I would therefore vacate the judgment and remand for a stay of proceedings for a reasonable time to await a decree of the Philippine court. If it should appear later that no such decree can be expected, the Court of Appeals could decide on the next step in light of the Court's opinion. For reasons given by JUSTICE STEVENS, I would order that any further proceedings in the District Court be held before a judge fresh to the case.

Syllabus

TAYLOR *v.* STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07–371. Argued April 16, 2008—Decided June 12, 2008

Greg Herrick, an antique aircraft enthusiast seeking to restore a vintage airplane manufactured by the Fairchild Engine and Airplane Corporation (FEAC), filed a Freedom of Information Act (FOIA) request asking the Federal Aviation Administration (FAA) for copies of technical documents related to the airplane. The FAA denied his request based on FOIA's exemption for trade secrets, see 5 U. S. C. §552(b)(4). Herrick took an administrative appeal, but when respondent Fairchild, FEAC's successor, objected to the documents' release, the FAA adhered to its original decision. Herrick then filed an unsuccessful FOIA lawsuit to secure the documents. Less than a month after that suit was resolved, petitioner Taylor, Herrick's friend and an antique aircraft enthusiast himself, made a FOIA request for the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed suit in the U. S. District Court for the District of Columbia. Holding the suit barred by claim preclusion, the District Court granted summary judgment to the FAA and to Fairchild, as intervenor in Taylor's action. The court acknowledged that Taylor was not a party to Herrick's suit, but held that a nonparty may be bound by a judgment if she was "virtually represented" by a party. The D. C. Circuit affirmed, announcing a five-factor test for "virtual representation." The first two factors of the D. C. Circuit's test—"identity of interests" and "adequate representation"—are necessary but not sufficient for virtual representation. In addition, at least one of three other factors must be established: "a close relationship between the present party and his putative representative," "substantial participation by the present party in the first case," or "tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." The D. C. Circuit acknowledged the absence of any indication that Taylor participated in, or even had notice of, Herrick's suit. It nonetheless found the "identity of interests," "adequate representation," and "close relationship" factors satisfied because the two men sought release of the same documents, were "close associates," had discussed working together to restore Herrick's plane, and had used the same lawyer to pursue their suits. Because these conditions sufficed to establish virtual representation, the

Syllabus

court left open the question whether Taylor had engaged in tactical maneuvering to avoid preclusion.

Held:

1. The theory of preclusion by "virtual representation" is disapproved. The preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to the established grounds for nonparty preclusion. Pp. 891–904.

(a) The preclusive effect of a federal-court judgment is determined by federal common law, subject to due process limitations. Pp. 892–895.

(1) Extending the preclusive effect of a judgment to a nonparty runs up against the "deep-rooted historic tradition that everyone should have his own day in court." *Richards* v. *Jefferson County*, 517 U. S. 793, 798 (internal quotation marks omitted). Indicating the strength of that tradition, this Court has often repeated the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U. S. 32, 40. Pp. 892–893.

(2) The rule against nonparty preclusion is subject to exceptions, grouped for present purposes into six categories. First, "[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the [agreement's] terms." Restatement (Second) of Judgments § 40. Second, nonparty preclusion may be based on a pre-existing substantive legal relationship between the person to be bound and a party to the judgment, *e. g.*, assignee and assignor. Third, "in certain limited circumstances," a nonparty may be bound by a judgment because she was "'adequately represented by someone with the same interests who [wa]s a party'" to the suit. *Richards*, 517 U. S., at 798. Fourth, a nonparty is bound by a judgment if she "assume[d] control" over the litigation in which that judgment was rendered. *Montana* v. *United States*, 440 U. S. 147, 154. Fifth, a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in litigation later brings suit as the designated representative or agent of a person who was a party to the prior adjudication. Sixth, a special statutory scheme otherwise consistent with due process—*e. g.*, bankruptcy proceedings—may "expressly foreclos[e] successive litigation by nonlitigants." *Martin* v. *Wilks*, 490 U. S. 755, 762, n. 2. Pp. 893–895.

(b) Reaching beyond these six categories, the D. C. Circuit recognized a broad "virtual representation" exception to the rule against nonparty preclusion. None of the arguments advanced by that court, the FAA, or Fairchild justify such an expansive doctrine. Pp. 895–904.

Syllabus

(1) The D. C. Circuit purported to ground its doctrine in this Court's statements that, in some circumstances, a person may be bound by a judgment if she was adequately represented by a party to the proceeding yielding that judgment. But the D. C. Circuit's definition of "adequate representation" strayed from the meaning this Court has attributed to that term. In *Richards*, the Alabama Supreme Court had held a tax challenge barred by a judgment upholding the same tax in a suit by different taxpayers. 517 U. S., at 795–797. This Court reversed, holding that nonparty preclusion was inconsistent with due process where there was no showing (1) that the court in the first suit "took care to protect the interests" of absent parties, or (2) that the parties to the first litigation "understood their suit to be on behalf of absent [parties]," *id.*, at 802. In holding that representation can be "adequate" for purposes of nonparty preclusion even where these two factors are absent, the D. C. Circuit misapprehended *Richards*. Pp. 896–898.

(2) Fairchild and the FAA ask this Court to abandon altogether the attempt to delineate discrete grounds and clear rules for nonparty preclusion. Instead, they contend, only an equitable and heavily fact-driven inquiry can account for all of the situations in which nonparty preclusion is appropriate. This argument is rejected. First, respondents' balancing test is at odds with the constrained approach advanced by this Court's decisions, which have endeavored to delineate discrete, limited exceptions to the fundamental rule that a litigant is not bound by a judgment to which she was not a party, see, *e. g.*, *Richards*, 517 U. S., at 798–799. Second, a party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned, see *Hansberry*, 311 U. S., at 43, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the nonparty's interests, see *Richards*, 517 U. S., at 801–802. Adequate representation may also require (3) notice of the original suit to the persons alleged to have been represented. See *id.*, at 801. In the class-action context, these limitations are implemented by Federal Rule of Civil Procedure 23's procedural safeguards. But an expansive virtual representation doctrine would recognize a common-law kind of class action shorn of these protections. Third, a diffuse balancing approach to nonparty preclusion would likely complicate the task of district courts faced in the first instance with preclusion questions. Pp. 898–901.

(3) Finally, the FAA contends that nonparty preclusion should apply more broadly in "public law" litigation than in "private law" controversies. First, the FAA points to *Richards*' acknowledgment that when a taxpayer challenges "an alleged misuse of public funds" or "other public action," the suit "has only an indirect impact on [the plaintiff's]

Syllabus

interests," 517 U. S., at 803, and "the States have wide latitude to establish procedures [limiting] the number of judicial proceedings that may be entertained," *ibid.* In contrast to the public-law litigation contemplated in *Richards*, however, a successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefiting the public at large. Furthermore, *Richards* said only that, for the type of public-law claims there envisioned, States were free to adopt procedures limiting repetitive litigation. While it appears equally evident that *Congress* can adopt such procedures, it hardly follows that *this Court* should proscribe or confine successive FOIA suits by different requesters. Second, the FAA argues that, because the number of plaintiffs in public-law cases is potentially limitless, it is theoretically possible for several persons to coordinate a series of vexatious repetitive lawsuits. But this risk does not justify departing from the usual nonparty preclusion rules. *Stare decisis* will allow courts to dispose of repetitive suits in the same circuit, and even when *stare decisis* is not dispositive, the human inclination not to waste money should discourage suits based on claims or issues already decided. Pp. 902–904.

2. The remaining question is whether the result reached by the courts below can be justified based on one of the six established grounds for nonparty preclusion. With one exception, those grounds plainly have no application here. Respondents argue that Taylor's suit is a collusive attempt to relitigate Herrick's claim. That argument justifies a remand to allow the courts below the opportunity to determine whether the fifth ground for nonparty preclusion—preclusion because a nonparty to earlier litigation has brought suit as an agent of a party bound by the prior adjudication—applies to Taylor's suit. But courts should be cautious about finding preclusion on the basis of agency. A mere whiff of "tactical maneuvering" will not suffice; instead, principles of agency law indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication. Finally, the Court rejects Fairchild's suggestion that Taylor must bear the burden of proving he is not acting as Herrick's agent. Claim preclusion is an affirmative defense for the defendant to plead and prove. Pp. 904–907.

490 F. 3d 965, vacated and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

Adina H. Rosenbaum argued the cause for petitioner. With her on the briefs were *Brian Wolfman*, *Scott L. Nelson*, and *Michael John Pangia*.

Douglas Hallward-Driemeier argued the cause for the federal respondent. With him on the brief were former *Solicitor General Clement*, *Acting Assistant Attorney General Bucholtz*, *Deputy Solicitor General Kneedler*, *Leonard Schaitman*, and *Robert D. Kamenshine*.

Catherine E. Stetson argued the cause for respondent Fairchild Corporation. With her on the brief were *Christopher T. Handman* and *N. Thomas Connally*.*

JUSTICE GINSBURG delivered the opinion of the Court.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U. S. 32, 40 (1940). Several exceptions, recognized in this Court's decisions, temper this basic rule. In a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation. See *id.*, at 41. In this case, we consider for the first time whether there is a "virtual representation" exception to the general rule against precluding nonparties. Adopted by a number of courts, including the courts below in the case now before us, the exception so styled is broader than any we have so far approved.

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*Briefs of *amici curiae* urging reversal were filed for the American Association for Justice by *John Vail* and *Kathleen Flynn Peterson;* for Civil Procedure and Complex Litigation Professors by *David L. Shapiro* and *John Leubsdorf*, both *pro se;* for the National Security Archive et al. by *Meredith Fuchs;* and for Lavonna Eddy et al. by *James A. Feldman* and *Gerald S. Hartman*.

Mark L. Shurtleff, Attorney General of Utah, and *Philip S. Lott* and *Peggy E. Stone*, Assistant Attorneys General, filed a brief for the State of Utah as *amicus curiae* urging affirmance.

Jack R. Bierig filed a brief for the American Dental Association as *amicus curiae*.

The virtual representation question we examine in this opinion arises in the following context. Petitioner Brent Taylor filed a lawsuit under the Freedom of Information Act seeking certain documents from the Federal Aviation Administration. Greg Herrick, Taylor's friend, had previously brought an unsuccessful suit seeking the same records. The two men have no legal relationship, and there is no evidence that Taylor controlled, financed, participated in, or even had notice of Herrick's earlier suit. Nevertheless, the D. C. Circuit held Taylor's suit precluded by the judgment against Herrick because, in that court's assessment, Herrick qualified as Taylor's "virtual representative."

We disapprove the doctrine of preclusion by "virtual representation," and hold, based on the record as it now stands, that the judgment against Herrick does not bar Taylor from maintaining this suit.

I

The Freedom of Information Act (FOIA or Act) accords "any person" a right to request any records held by a federal agency. 5 U. S. C. § 552(a)(3)(A) (2006 ed.). No reason need be given for a FOIA request, and unless the requested materials fall within one of the Act's enumerated exemptions, see § 552(a)(3)(E), (b), the agency must "make the records promptly available" to the requester, § 552(a)(3)(A). If an agency refuses to furnish the requested records, the requester may file suit in federal court and obtain an injunction "order[ing] the production of any agency records improperly withheld." § 552(a)(4)(B).

The courts below held the instant FOIA suit barred by the judgment in earlier litigation seeking the same records. Because the lower courts' decisions turned on the connection between the two lawsuits, we begin with a full account of each action.

A

The first suit was filed by Greg Herrick, an antique aircraft enthusiast and the owner of an F–45 airplane, a vintage

model manufactured by the Fairchild Engine and Airplane Corporation (FEAC) in the 1930's. In 1997, seeking information that would help him restore his plane to its original condition, Herrick filed a FOIA request asking the Federal Aviation Administration (FAA) for copies of any technical documents about the F–45 contained in the agency's records.

To gain a certificate authorizing the manufacture and sale of the F–45, FEAC had submitted to the FAA's predecessor, the Civil Aeronautics Authority, detailed specifications and other technical data about the plane. Hundreds of pages of documents produced by FEAC in the certification process remain in the FAA's records. The FAA denied Herrick's request, however, upon finding that the documents he sought are subject to FOIA's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential," § 552(b)(4). In an administrative appeal, Herrick urged that FEAC and its successors had waived any trade-secret protection. The FAA thereupon contacted FEAC's corporate successor, respondent Fairchild Corporation (Fairchild). Because Fairchild objected to release of the documents, the agency adhered to its original decision.

Herrick then filed suit in the U. S. District Court for the District of Wyoming. Challenging the FAA's invocation of the trade-secret exemption, Herrick placed heavy weight on a 1955 letter from FEAC to the Civil Aeronautics Authority. The letter authorized the agency to lend any documents in its files to the public "for use in making repairs or replacement parts for aircraft produced by Fairchild." *Herrick* v. *Garvey*, 298 F. 3d 1184, 1193 (CA10 2002) (internal quotation marks omitted). This broad authorization, Herrick maintained, showed that the F–45 certification records held by the FAA could not be regarded as "secre[t]" or "confidential" within the meaning of § 552(b)(4).

Rejecting Herrick's argument, the District Court granted summary judgment to the FAA. *Herrick* v. *Garvey*, 200

F. Supp. 2d 1321, 1328–1329 (Wyo. 2000). The 1955 letter, the court reasoned, did not deprive the F–45 certification documents of trade-secret status, for those documents were never in fact released pursuant to the letter's blanket authorization. See *id.*, at 1329. The court also stated that even if the 1955 letter had waived trade-secret protection, Fairchild had successfully "reversed" the waiver by objecting to the FAA's release of the records to Herrick. *Ibid.*

On appeal, the Tenth Circuit agreed with Herrick that the 1955 letter had stripped the requested documents of trade-secret protection. See *Herrick*, 298 F. 3d, at 1194. But the Court of Appeals upheld the District Court's alternative determination—*i. e.*, that Fairchild had restored trade-secret status by objecting to Herrick's FOIA request. *Id.*, at 1195. On that ground, the appeals court affirmed the entry of summary judgment for the FAA.

In so ruling, the Tenth Circuit noted that Herrick had failed to challenge two suppositions underlying the District Court's decision. First, the District Court assumed trade-secret status could be "restored" to documents that had lost protection. *Id.*, at 1194, n. 10. Second, the District Court also assumed that Fairchild had regained trade-secret status for the documents even though the company claimed that status only "*after* Herrick had initiated his request" for the F–45 records. *Ibid.* The Court of Appeals expressed no opinion on the validity of these suppositions. See *id.*, at 1194–1195, n. 10.

B

The Tenth Circuit's decision issued on July 24, 2002. Less than a month later, on August 22, petitioner Brent Taylor—a friend of Herrick's and an antique aircraft enthusiast in his own right—submitted a FOIA request seeking the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed a complaint in the U. S. District Court for the District of Columbia. Like Herrick, Taylor argued that FEAC's 1955 letter had stripped

the records of their trade-secret status. But Taylor also sought to litigate the two issues concerning recapture of protected status that Herrick had failed to raise in his appeal to the Tenth Circuit.

After Fairchild intervened as a defendant,[1] the District Court in D. C. concluded that Taylor's suit was barred by claim preclusion; accordingly, it granted summary judgment to Fairchild and the FAA. The court acknowledged that Taylor was not a party to Herrick's suit. Relying on the Eighth Circuit's decision in *Tyus* v. *Schoemehl*, 93 F. 3d 449 (1996), however, it held that a nonparty may be bound by a judgment if she was "virtually represented" by a party. App. to Pet. for Cert. 30a–31a.

The Eighth Circuit's seven-factor test for virtual representation, adopted by the District Court in Taylor's case, requires an "identity of interests" between the person to be bound and a party to the judgment. See *id.*, at 31a. See also *Tyus*, 93 F. 3d, at 455. Six additional factors counsel in favor of virtual representation under the Eighth Circuit's test, but are not prerequisites: (1) a "close relationship" between the present party and a party to the judgment alleged to be preclusive; (2) "participation in the prior litigation" by the present party; (3) the present party's "apparent acquiescence" to the preclusive effect of the judgment; (4) "deliberat[e] maneuver[ing]" to avoid the effect of the judgment; (5) adequate representation of the present party by a party to the prior adjudication; and (6) a suit raising a "public law" rather than a "private law" issue. App. to Pet. for Cert. 31a (citing *Tyus*, 93 F. 3d, at 454–456). These factors, the D. C. District Court observed, "constitute a fluid test with imprecise boundaries" and call for "a broad, case-by-case inquiry." App. to Pet. for Cert. 32a.

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[1] Although Fairchild provided documents to the Wyoming District Court and filed an *amicus* brief in the Tenth Circuit, it was not a party to Herrick's suit. See *Herrick* v. *Garvey*, 298 F. 3d 1184, 1188 (CA10 2002); *Herrick* v. *Garvey*, 200 F. Supp. 2d 1321, 1327 (Wyo. 2000).

The record before the District Court in Taylor's suit revealed the following facts about the relationship between Taylor and Herrick: Taylor is the president of the Antique Aircraft Association, an organization to which Herrick belongs; the two men are "close associate[s]," App. 54; Herrick asked Taylor to help restore Herrick's F–45, though they had no contract or agreement for Taylor's participation in the restoration; Taylor was represented by the lawyer who represented Herrick in the earlier litigation; and Herrick apparently gave Taylor documents that Herrick had obtained from the FAA during discovery in his suit.

Fairchild and the FAA conceded that Taylor had not participated in Herrick's suit. App. to Pet. for Cert. 32a. The D. C. District Court determined, however, that Herrick ranked as Taylor's virtual representative because the facts fit each of the other six indicators on the Eighth Circuit's list. See *id.*, at 32a–35a. Accordingly, the District Court held Taylor's suit, seeking the same documents Herrick had requested, barred by the judgment against Herrick. See *id.*, at 35a.

The D. C. Circuit affirmed. It observed, first, that other Circuits "vary widely" in their approaches to virtual representation. *Taylor* v. *Blakey*, 490 F. 3d 965, 971 (2007). In this regard, the D. C. Circuit contrasted the multifactor balancing test applied by the Eighth Circuit and the D. C. District Court with the Fourth Circuit's narrower approach, which "treats a party as a virtual representative only if the party is 'accountable to the nonparties who file a subsequent suit' and has 'the tacit approval of the court' to act on the nonpart[ies'] behalf." *Ibid.* (quoting *Klugh* v. *United States*, 818 F. 2d 294, 300 (CA4 1987)).

Rejecting both of these approaches, the D. C. Circuit announced its own five-factor test. The first two factors—"identity of interests" and "adequate representation"—are necessary but not sufficient for virtual representation. 490 F. 3d, at 971–972. In addition, at least one of three other

factors must be established: "a close relationship between the present party and his putative representative," "substantial participation by the present party in the first case," or "tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." *Id.*, at 972.

Applying this test to the record in Taylor's case, the D. C. Circuit found both of the necessary conditions for virtual representation well met. As to identity of interests, the court emphasized that Taylor and Herrick sought the same result—release of the F–45 documents. Moreover, the D. C. Circuit observed, Herrick owned an F–45 airplane, and therefore had, "if anything, a stronger incentive to litigate" than Taylor, who had only a "general interest in public disclosure and the preservation of antique aircraft heritage." *Id.*, at 973 (internal quotation marks omitted).

Turning to adequacy of representation, the D. C. Circuit acknowledged that some other Circuits regard notice of a prior suit as essential to a determination that a nonparty was adequately represented in that suit. See *id.*, at 973–974 (citing *Perez* v. *Volvo Car Corp.*, 247 F. 3d 303, 312 (CA1 2001), and *Tice* v. *American Airlines, Inc.*, 162 F. 3d 966, 973 (CA7 1998)). Disagreeing with these courts, the D. C. Circuit deemed notice an "important" but not an indispensable element in the adequacy inquiry. The court then concluded that Herrick had adequately represented Taylor even though Taylor had received no notice of Herrick's suit. For this conclusion, the appeals court relied on Herrick's "strong incentive to litigate" and Taylor's later engagement of the same attorney, which indicated to the court Taylor's satisfaction with that attorney's performance in Herrick's case. See 490 F. 3d, at 974–975.

The D. C. Circuit also found its "close relationship" criterion met, for Herrick had "asked Taylor to assist him in restoring his F–45" and "provided information to Taylor that Herrick had obtained through discovery"; furthermore, Taylor "did not oppose Fairchild's characterization of Herrick

as his 'close associate.'" *Id.*, at 975. Because the three above-described factors sufficed to establish virtual representation under the D. C. Circuit's five-factor test, the appeals court left open the question whether Taylor had engaged in "tactical maneuvering." See *id.*, at 976 (calling the facts bearing on tactical maneuvering "ambigu[ous]").[2]

We granted certiorari, 552 U. S. 1136 (2008), to resolve the disagreement among the Circuits over the permissibility and scope of preclusion based on "virtual representation."[3]

II

The preclusive effect of a federal-court judgment is determined by federal common law. See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 507–508 (2001). For judgments in federal-question cases—for example, Herrick's FOIA suit—federal courts participate in developing "uniform federal rule[s]" of res judicata, which this Court has ultimate authority to determine and declare. *Id.*, at 508.[4] The federal common law of preclusion is, of course, subject to due process limitations. See *Richards* v. *Jefferson County*, 517 U. S. 793, 797 (1996).

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[2] The D. C. Circuit did not discuss the District Court's distinction between public-law and private-law claims.

[3] The Ninth Circuit applies a five-factor test similar to the D. C. Circuit's. See *Kourtis* v. *Cameron*, 419 F. 3d 989, 996 (2005). The Fifth, Sixth, and Eleventh Circuits, like the Fourth Circuit, have constrained the reach of virtual representation by requiring, *inter alia*, the existence of a legal relationship between the nonparty to be bound and the putative representative. See *Pollard* v. *Cockrell*, 578 F. 2d 1002, 1008 (CA5 1978); *Becherer* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F. 3d 415, 424 (CA6 1999) (en banc); *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F. 3d 1280, 1289 (CA11 2004). The Seventh Circuit, in contrast, has rejected the doctrine of virtual representation altogether. See *Perry* v. *Globe Auto Recycling, Inc.*, 227 F. 3d 950, 953 (2000).

[4] For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits. See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U. S. 497, 508 (2001).

Taylor's case presents an issue of first impression in this sense: Until now, we have never addressed the doctrine of "virtual representation" adopted (in varying forms) by several Circuits and relied upon by the courts below. Our inquiry, however, is guided by well-established precedent regarding the propriety of nonparty preclusion. We review that precedent before taking up directly the issue of virtual representation.

A

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata."[5] Under the doctrine of claim preclusion, a final judgment forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire* v. *Maine*, 532 U. S. 742, 748 (2001). Issue preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim. *Id.*, at 748–749. By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," these two doctrines protect against "the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana* v. *United States*, 440 U. S. 147, 153–154 (1979).

A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-

[5] These terms have replaced a more confusing lexicon. Claim preclusion describes the rules formerly known as "merger" and "bar," while issue preclusion encompasses the doctrines once known as "collateral estoppel" and "direct estoppel." See *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 77, n. 1 (1984).

rooted historic tradition that everyone should have his own day in court." *Richards*, 517 U. S., at 798 (internal quotation marks omitted). Indicating the strength of that tradition, we have often repeated the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry*, 311 U. S., at 40. See also, *e. g.*, *Richards*, 517 U. S., at 798; *Martin* v. *Wilks*, 490 U. S. 755, 761 (1989); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 110 (1969).

B

Though hardly in doubt, the rule against nonparty preclusion is subject to exceptions. For present purposes, the recognized exceptions can be grouped into six categories.[6]

First, "[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement." 1 Restatement (Second) of Judgments § 40, p. 390 (1980) (hereinafter Restatement). For example, "if separate actions involving the same transaction are brought by different plaintiffs against the same defendant, all the parties to all the actions may agree that the question of the defendant's liability will be definitely determined, one way or the other, in a 'test case.'" D. Shapiro, Civil Procedure: Preclusion in Civil Actions 77–78 (2001) (hereinafter Shapiro). See also *California* v. *Texas*, 459 U. S. 1096, 1097 (1983) (dismissing certain defendants from a suit based on a stipulation "that each of

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[6]The established grounds for nonparty preclusion could be organized differently. See, *e. g.*, 1 & 2 Restatement (Second) of Judgments §§ 39–62 (1980) (hereinafter Restatement); D. Shapiro, Civil Procedure: Preclusion in Civil Actions 75–92 (2001); 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4448, pp. 327–329 (2d ed. 2002) (hereinafter Wright & Miller). The list that follows is meant only to provide a framework for our consideration of virtual representation, not to establish a definitive taxonomy.

said defendants . . . will be bound by a final judgment of this Court" on a specified issue).[7]

Second, nonparty preclusion may be justified based on a variety of pre-existing "substantive legal relationship[s]" between the person to be bound and a party to the judgment. Shapiro 78. See also *Richards*, 517 U. S., at 798. Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. See 2 Restatement §§ 43–44, 52, 55. These exceptions originated "as much from the needs of property law as from the values of preclusion by judgment." 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4448, p. 329 (2d ed. 2002) (hereinafter Wright & Miller).[8]

Third, we have confirmed that, "in certain limited circumstances," a nonparty may be bound by a judgment because she was "adequately represented by someone with the same interests who [wa]s a party" to the suit. *Richards*, 517 U. S., at 798 (internal quotation marks omitted). Representative suits with preclusive effect on nonparties include properly conducted class actions, see *Martin*, 490 U. S., at 762, n. 2 (citing Fed. Rule Civ. Proc. 23), and suits brought by trustees, guardians, and other fiduciaries, see *Sea-Land Services*,

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[7] The Restatement observes that a nonparty may be bound not only by express or implied agreement, but also through conduct inducing reliance by others. See 2 Restatement § 62. See also 18A Wright & Miller § 4453, at 425–429. We have never had occasion to consider this ground for nonparty preclusion, and we express no view on it here.

[8] The substantive legal relationships justifying preclusion are sometimes collectively referred to as "privity." See, *e. g.*, *Richards* v. *Jefferson County*, 517 U. S. 793, 798 (1996); 2 Restatement § 62, Comment *a*. The term "privity," however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. See 18A Wright & Miller § 4449, at 351–353, and n. 33 (collecting cases). To ward off confusion, we avoid using the term "privity" in this opinion.

Inc. v. *Gaudet*, 414 U. S. 573, 593 (1974). See also 1 Restatement § 41.

Fourth, a nonparty is bound by a judgment if she "assume[d] control" over the litigation in which that judgment was rendered. *Montana*, 440 U. S., at 154. See also *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260, 262, n. 4 (1961); 1 Restatement § 39. Because such a person has had "the opportunity to present proofs and argument," he has already "had his day in court" even though he was not a formal party to the litigation. *Id.*, Comment *a*, at 382.

Fifth, a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication. See *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611, 620, 623 (1926); 18A Wright & Miller § 4454, at 433–434. And although our decisions have not addressed the issue directly, it also seems clear that preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment. See *id.*, § 4449, at 335.

Sixth, in certain circumstances a special statutory scheme may "expressly foreclos[e] successive litigation by nonlitigants . . . if the scheme is otherwise consistent with due process." *Martin*, 490 U. S., at 762, n. 2. Examples of such schemes include bankruptcy and probate proceedings, see *ibid.*, and *quo warranto* actions or other suits that, "under [the governing] law, [may] be brought only on behalf of the public at large," *Richards*, 517 U. S., at 804.

III

Reaching beyond these six established categories, some lower courts have recognized a "virtual representation" exception to the rule against nonparty preclusion. Decisions of these courts, however, have been far from consistent.

See 18A Wright & Miller § 4457, at 513 (virtual representation lacks a "clear or coherent theory"; decisions applying it have "an episodic quality"). Some Circuits use the label, but define "virtual representation" so that it is no broader than the recognized exception for adequate representation. See, *e. g.*, *Becherer* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F. 3d 415, 423, 427 (CA6 1999) (en banc). But other courts, including the Eighth, Ninth, and D. C. Circuits, apply multifactor tests for virtual representation that permit nonparty preclusion in cases that do not fit within any of the established exceptions. See *supra*, at 888–891, and n. 3.

The D. C. Circuit, the FAA, and Fairchild have presented three arguments in support of an expansive doctrine of virtual representation. We find none of them persuasive.

A

The D. C. Circuit purported to ground its virtual representation doctrine in this Court's decisions stating that, in some circumstances, a person may be bound by a judgment if she was adequately represented by a party to the proceeding yielding that judgment. See 490 F. 3d, at 970–971. But the D. C. Circuit's definition of "adequate representation" strayed from the meaning our decisions have attributed to that term.

In *Richards*, we reviewed a decision by the Alabama Supreme Court holding that a challenge to a tax was barred by a judgment upholding the same tax in a suit filed by different taxpayers. 517 U. S., at 795–797. The plaintiffs in the first suit "did not sue on behalf of a class," their complaint "did not purport to assert any claim against or on behalf of any nonparties," and the judgment "did not purport to bind" nonparties. *Id.*, at 801. There was no indication, we emphasized, that the court in the first suit "took care to protect the interests" of absent parties, or that the parties to that litigation "understood their suit to be on behalf of absent [parties]." *Id.*, at 802. In these circumstances, we held, the ap-

plication of claim preclusion was inconsistent with "the due process of law guaranteed by the Fourteenth Amendment." *Id.*, at 797.

The D. C. Circuit stated, without elaboration, that it did not "read *Richards* to hold a nonparty . . . adequately represented only if special procedures were followed [to protect the nonparty] or the party to the prior suit understood it was representing the nonparty." 490 F. 3d, at 971. As the D. C. Circuit saw this case, Herrick adequately represented Taylor for two principal reasons: Herrick had a strong incentive to litigate; and Taylor later hired Herrick's lawyer, suggesting Taylor's "satisfaction with the attorney's performance in the prior case." *Id.*, at 975.

The D. C. Circuit misapprehended *Richards*. As just recounted, our holding that the Alabama Supreme Court's application of res judicata to nonparties violated due process turned on the lack of either special procedures to protect the nonparties' interests or an understanding by the concerned parties that the first suit was brought in a representative capacity. See *Richards*, 517 U. S., at 801–802. *Richards* thus established that representation is "adequate" for purposes of nonparty preclusion only if (at a minimum) one of these two circumstances is present.

We restated *Richards*' core holding in *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160 (1999). In that case, as in *Richards*, the Alabama courts had held that a judgment rejecting a challenge to a tax by one group of taxpayers barred a subsequent suit by a different taxpayer. See 526 U. S., at 164–165. In *South Central Bell*, however, the nonparty had notice of the original suit and engaged one of the lawyers earlier employed by the original plaintiffs. See *id.*, at 167–168. Under the D. C. Circuit's decision in Taylor's case, these factors apparently would have sufficed to establish adequate representation. See 490 F. 3d, at 973–975. Yet *South Central Bell* held that the application of res judicata in that case violated due process. Our inquiry came

to an end when we determined that the original plaintiffs had not understood themselves to be acting in a representative capacity and that there had been no special procedures to safeguard the interests of absentees. See 526 U. S., at 168.

Our decisions recognizing that a nonparty may be bound by a judgment if she was adequately represented by a party to the earlier suit thus provide no support for the D. C. Circuit's broad theory of virtual representation.

B

Fairchild and the FAA do not argue that the D. C. Circuit's virtual representation doctrine fits within any of the recognized grounds for nonparty preclusion. Rather, they ask us to abandon the attempt to delineate discrete grounds and clear rules altogether. Preclusion is in order, they contend, whenever "the relationship between a party and a non-party is 'close enough' to bring the second litigant within the judgment." Brief for Respondent Fairchild 20. See also Brief for Respondent FAA 22–24. Courts should make the "close enough" determination, they urge, through a "heavily fact-driven" and "equitable" inquiry. Brief for Respondent Fairchild 20. See also Brief for Respondent FAA 22 ("there is no clear test" for nonparty preclusion; rather, an "equitable and fact-intensive" inquiry is demanded (internal quotation marks omitted)). Only this sort of diffuse balancing, Fairchild and the FAA argue, can account for all of the situations in which nonparty preclusion is appropriate.

We reject this argument for three reasons. First, our decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party. See, *e. g.*, *Richards*, 517 U. S., at 798–799; *Martin*, 490 U. S., at 761–762. Accordingly, we have endeavored to delineate discrete exceptions that apply in "limited circumstances." *Id.*, at 762, n. 2. Respondents' amorphous balancing test is at odds with the constrained approach to nonparty preclusion our decisions advance.

Resisting this reading of our precedents, respondents call up three decisions they view as supportive of the approach they espouse. Fairchild quotes our statement in *Corgell* v. *Phipps*, 317 U. S. 406, 411 (1943), that privity "turns on the facts of particular cases." See Brief for Respondent Fairchild 20. That observation, however, scarcely implies that privity is governed by a diffuse balancing test.[9] Fairchild also cites *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation*, 402 U. S. 313, 334 (1971), which stated that estoppel questions turn on "the trial courts' sense of justice and equity." See Brief for Respondent Fairchild 20. This passing statement, however, was not made with nonparty preclusion in mind; it appeared in a discussion recognizing district courts' discretion to *limit* the use of issue preclusion against persons who *were* parties to a judgment. See *Blonder-Tongue*, 402 U. S., at 334.

The FAA relies on *United States* v. *Des Moines Valley R. Co.*, 84 F. 40 (CA8 1897), an opinion we quoted with approval in *Schendel*, 270 U. S., at 619–620. *Des Moines Valley* was a quiet title action in which the named plaintiff was the United States. The Government, however, had "no interest in the land" and had "simply permitted [the landowner] to use its name as the nominal plaintiff." 84 F., at 42. The suit was therefore barred, the appeals court held, by an earlier judgment against the landowner. As the court explained: "[W]here the government lends its name as a plaintiff . . . to enable one private person to maintain a suit against another," the government is "subject to the same defenses which exist . . . against the real party in interest." *Id.*, at 43. *Des Moines Valley*, the FAA contended at oral argument, demonstrates that it is sometimes appropriate to bind

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[9] Moreover, *Corgell* interpreted the term "privity" not in the context of res judicata, but as used in a statute governing shipowner liability. See *Corgell* v. *Phipps*, 317 U. S. 406, 407–408, and n. 1 (1943). And we made the statement Fairchild quotes in explaining why it was appropriate to defer to the findings of the lower courts, not as a comment on the substantive rules of privity. See *id.*, at 411.

a nonparty in circumstances that do not fit within any of the established grounds for nonparty preclusion. See Tr. of Oral Arg. 31–33. Properly understood, however, *Des Moines Valley* is simply an application of the fifth basis for nonparty preclusion described above: A party may not use a representative or agent to relitigate an adverse judgment. See *supra*, at 895–896.[10] We thus find no support in our precedents for the lax approach to nonparty preclusion advocated by respondents.

Our second reason for rejecting a broad doctrine of virtual representation rests on the limitations attending nonparty preclusion based on adequate representation. A party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned, see *Hansberry*, 311 U. S., at 43; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty, see *Richards*, 517 U. S., at 801–802; *supra*, at 897–898. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented, see *Richards*, 517 U. S., at 801.[11] In the class-action context,

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[10] The FAA urges that there was no agency relationship between the landowner and the United States because the landowner did not control the U. S. Attorney's conduct of the suit. See Tr. of Oral Arg. 33. That point is debatable. See *United States* v. *Des Moines Valley R. Co.*, 84 F. 40, 42–43 (CA8 1897) (the United States was only a "nominal plaintiff"; it merely "len[t]" its name to the landowner). But even if the FAA is correct about agency, the United States plainly litigated as the landowner's designated representative. See *id.*, at 42 ("The bill does not attempt to conceal the fact that . . . its real purpose is to champion the cause of [the landowner] . . . ."). See also *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611, 618–620 (1926) (classifying *Des Moines Valley* with other cases of preclusion based on representation).

[11] *Richards* suggested that notice is required in some representative suits, *e. g.*, class actions seeking monetary relief. See 517 U. S., at 801 (citing *Hansberry* v. *Lee*, 311 U. S. 32, 40 (1940), *Eisen* v. *Carlisle & Jac-*

these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.

An expansive doctrine of virtual representation, however, would "recogniz[e], in effect, a common-law kind of class action." *Tice*, 162 F. 3d, at 972 (internal quotation marks omitted). That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in *Hansberry*, *Richards*, and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to "create *de facto* class actions at will." *Tice*, 162 F. 3d, at 973.

Third, a diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves. Most obviously, it could significantly complicate the task of district courts faced in the first instance with preclusion questions. An all-things-considered balancing approach might spark wide-ranging, time-consuming, and expensive discovery tracking factors potentially relevant under seven- or five-prong tests. And after the relevant facts are established, district judges would be called upon to evaluate them under a standard that provides no firm guidance. See *Tyus*, 93 F. 3d, at 455 (conceding that "there is no clear test for determining the applicability of" the virtual representation doctrine announced in that case). Preclusion doctrine, it should be recalled, is intended to reduce the burden of litigation on courts and parties. Cf. *Montana*, 440 U. S., at 153–154. "In this area of the law," we agree, "'crisp rules with sharp corners' are preferable to a round-about doctrine of opaque standards." *Bittinger* v. *Tecumseh Products Co.*, 123 F. 3d 877, 881 (CA6 1997).

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quelin, 417 U. S. 156, 177 (1974), and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 319 (1950)). But we assumed without deciding that a lack of notice might be overcome in some circumstances. See *Richards*, 517 U. S., at 801.

C

Finally, relying on the Eighth Circuit's decision in *Tyus*, 93 F. 3d, at 456, the FAA maintains that nonparty preclusion should apply more broadly in "public law" litigation than in "private law" controversies. To support this position, the FAA offers two arguments. First, the FAA urges, our decision in *Richards* acknowledges that, in certain cases, the plaintiff has a reduced interest in controlling the litigation "because of the public nature of the right at issue." Brief for Respondent FAA 28. When a taxpayer challenges "an alleged misuse of public funds" or "other public action," we observed in *Richards*, the suit "has only an indirect impact on [the plaintiff's] interests." 517 U. S., at 803. In actions of this character, the Court said, "we may assume that the States have wide latitude to establish procedures . . . to limit the number of judicial proceedings that may be entertained." *Ibid.*

Taylor's FOIA action falls within the category described in *Richards*, the FAA contends, because "the duty to disclose under FOIA is owed to the public generally." Brief for Respondent FAA 34. The opening sentence of FOIA, it is true, states that agencies "shall make [information] available to the public." 5 U. S. C. § 552(a) (2006 ed.). Equally true, we have several times said that FOIA vindicates a "public" interest. *E. g., National Archives and Records Admin.* v. *Favish*, 541 U. S. 157, 172 (2004). The Act, however, instructs agencies receiving FOIA requests to make the information available not to the public at large, but rather to the "person" making the request. § 552(a)(3)(A). See also § 552(a)(3)(B) ("In making any record available *to a person* under this paragraph, an agency shall provide the record in any [readily reproducible] form or format requested *by the person* . . . ." (emphasis added)); Brief for National Security Archive et al. as *Amici Curiae* 10 ("Government agencies do not systematically make released records available to the general public."). Thus, in contrast to the public-law litiga-

tion contemplated in *Richards*, a successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefiting the public at large.

Furthermore, we said in *Richards* only that, for the type of public-law claims there envisioned, States are free to adopt procedures limiting repetitive litigation. See 517 U. S., at 803. In this regard, we referred to instances in which the first judgment foreclosed successive litigation by other plaintiffs because, "under state law, [the suit] could be brought only on behalf of the public at large." *Id.*, at 804.[12] *Richards* spoke of state legislation, but it appears equally evident that *Congress*, in providing for actions vindicating a public interest, may "limit the number of judicial proceedings that may be entertained." *Id.*, at 803. It hardly follows, however, that *this Court* should proscribe or confine successive FOIA suits by different requesters. Indeed, Congress' provision for FOIA suits with no statutory constraint on successive actions counsels against judicial imposition of constraints through extraordinary application of the common law of preclusion.

The FAA next argues that "the threat of vexatious litigation is heightened" in public-law cases because "the number of plaintiffs with standing is potentially limitless." Brief for Respondent FAA 28 (internal quotation marks omitted). FOIA does allow "any person" whose request is denied to resort to federal court for review of the agency's determination. 5 U. S. C. §552(a)(3)(A), (4)(B) (2006 ed.). Thus it is theoretically possible that several persons could coordinate to mount a series of repetitive lawsuits.

But we are not convinced that this risk justifies departure from the usual rules governing nonparty preclusion. First, *stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare*

[12] Nonparty preclusion in such cases ranks under the sixth exception described above: special statutory schemes that expressly limit subsequent suits. See *supra*, at 895.

decisis is not dispositive, "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others." Shapiro 97. This intuition seems to be borne out by experience: The FAA has not called our attention to any instances of abusive FOIA suits in the Circuits that reject the virtual representation theory respondents advocate here.

IV

For the foregoing reasons, we disapprove the theory of virtual representation on which the decision below rested. The preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to the established grounds for nonparty preclusion described in this opinion. See Part II–B, *supra*.

Although references to "virtual representation" have proliferated in the lower courts, our decision is unlikely to occasion any great shift in actual practice. Many opinions use the term "virtual representation" in reaching results at least arguably defensible on established grounds. See 18A Wright & Miller § 4457, at 535–539, and n. 38 (collecting cases). In these cases, dropping the "virtual representation" label would lead to clearer analysis with little, if any, change in outcomes. See *Tice*, 162 F. 3d, at 971 ("[T]he term 'virtual representation' has cast more shadows than light on the problem [of nonparty preclusion].").

In some cases, however, lower courts have relied on virtual representation to extend nonparty preclusion beyond the latter doctrine's proper bounds. We now turn back to Taylor's action to determine whether his suit is such a case, or whether the result reached by the courts below can be justified on one of the recognized grounds for nonparty preclusion.

A

It is uncontested that four of the six grounds for nonparty preclusion have no application here: There is no indication

that Taylor agreed to be bound by Herrick's litigation, that Taylor and Herrick have any legal relationship, that Taylor exercised any control over Herrick's suit, or that this suit implicates any special statutory scheme limiting relitigation. Neither the FAA nor Fairchild contends otherwise.

It is equally clear that preclusion cannot be justified on the theory that Taylor was adequately represented in Herrick's suit. Nothing in the record indicates that Herrick understood himself to be suing on Taylor's behalf, that Taylor even knew of Herrick's suit, or that the Wyoming District Court took special care to protect Taylor's interests. Under our pathmarking precedent, therefore, Herrick's representation was not "adequate." See *Richards*, 517 U. S., at 801–802.

That leaves only the fifth category: preclusion because a nonparty to an earlier litigation has brought suit as a representative or agent of a party who is bound by the prior adjudication. Taylor is not Herrick's legal representative and he has not purported to sue in a representative capacity. He concedes, however, that preclusion would be appropriate if respondents could demonstrate that he is acting as Herrick's "undisclosed agen[t]." Brief for Petitioner 23, n. 4. See also *id.*, at 24, n. 5.

Respondents argue here, as they did below, that Taylor's suit is a collusive attempt to relitigate Herrick's action. See Brief for Respondent Fairchild 32, and n. 18; Brief for Respondent FAA 18–19, 33, 39. The D. C. Circuit considered a similar question in addressing the "tactical maneuvering" prong of its virtual representation test. See 490 F. 3d, at 976. The Court of Appeals did not, however, treat the issue as one of agency, and it expressly declined to reach any definitive conclusions due to "the ambiguity of the facts." *Ibid.* We therefore remand to give the courts below an opportunity to determine whether Taylor, in pursuing the instant FOIA suit, is acting as Herrick's agent. Taylor concedes that such a remand is appropriate. See Tr. of Oral Arg. 56–57.

We have never defined the showing required to establish that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case. Because the issue has not been briefed in any detail, we do not discuss the matter elaboratively here. We note, however, that courts should be cautious about finding preclusion on this basis. A mere whiff of "tactical maneuvering" will not suffice; instead, principles of agency law are suggestive. They indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication. See 1 Restatement (Second) of Agency § 14, p. 60 (1957) ("A principal has the right to control the conduct of the agent with respect to matters entrusted to him.").[13]

B

On remand, Fairchild suggests, Taylor should bear the burden of proving he is not acting as Herrick's agent. When a defendant points to evidence establishing a close relationship between successive litigants, Fairchild maintains, "the burden [should] shif[t] to the second litigant to submit evidence refuting the charge" of agency. Brief for Respondent Fairchild 27–28. Fairchild justifies this proposed burden-shift on the ground that "it is unlikely an opposing party will have access to direct evidence of collusion." *Id.*, at 28, n. 14.

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[13] Our decision in *Montana* v. *United States*, 440 U. S. 147 (1979), also suggests a "control" test for agency. In that case, we held that the United States was barred from bringing a suit because it had controlled a prior unsuccessful action filed by a federal contractor. See *id.*, at 155. We see no reason why preclusion based on a lesser showing would have been appropriate if the order of the two actions had been switched—that is, if the United States had brought the first suit itself, and then sought to relitigate the same claim through the contractor. See *Schendel*, 270 U. S., at 618 ("[I]f, in legal contemplation, there is identity of parties" when two suits are brought in one order, "there must be like identity" when the order is reversed.).

We reject Fairchild's suggestion. Claim preclusion, like issue preclusion, is an affirmative defense. See Fed. Rule Civ. Proc. 8(c); *Blonder-Tongue*, 402 U. S., at 350. Ordinarily, it is incumbent on the defendant to plead and prove such a defense, see *Jones* v. *Bock*, 549 U. S. 199, 204 (2007), and we have never recognized claim preclusion as an exception to that general rule, see 18 Wright & Miller § 4405, at 83 ("[A] party asserting preclusion must carry the burden of establishing all necessary elements."). We acknowledge that direct evidence justifying nonparty preclusion is often in the hands of plaintiffs rather than defendants. See, *e. g.*, *Montana*, 440 U. S., at 155 (listing evidence of control over a prior suit). But "[v]ery often one must plead and prove matters as to which his adversary has superior access to the proof." 2 K. Broun, McCormick on Evidence § 337, p. 475 (6th ed. 2006). In these situations, targeted interrogatories or deposition questions can reduce the information disparity. We see no greater cause here than in other matters of affirmative defense to disturb the traditional allocation of the proof burden.

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For the reasons stated, the judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 907 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR APRIL 18 THROUGH JUNE 11, 2008

APRIL 18, 2008

Miscellaneous Order

No. 07A841. RILEY, GOVERNOR OF ALABAMA *v.* PLUMP. Application for stay of judgment of the United States District Court for the Middle District of Alabama, Civ. Action No. 2:07–cv–1014, entered January 22, 2008, and amended January 25, 2008, presented to JUSTICE THOMAS, and by him referred to the Court, granted pending the timely docketing of the appeal in this Court. Should the jurisdictional statement be timely filed, this order shall remain in effect pending this Court's action on the appeal. If the appeal is dismissed, or the judgment affirmed, this order shall terminate automatically. In the event jurisdiction is noted or postponed, this order will remain in effect pending the sending down of the judgment of this Court.

APRIL 21, 2008

Certiorari Granted—Vacated and Remanded

No. 07–5346. MORRIS *v.* UNITED STATES. C. A. 10th Cir. Reported below: 234 Fed. Appx. 848;

No. 07–5403. MCCOY *v.* UNITED STATES. C. A. 8th Cir. Reported below: 221 Fed. Appx. 504;

No. 07–5549. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 484 F. 3d 542;

No. 07–5698. MILLER *v.* UNITED STATES. C. A. 8th Cir. Reported below: 223 Fed. Appx. 522;

No. 07–6252. JONES *v.* UNITED STATES. C. A. 8th Cir. Reported below: 224 Fed. Appx. 548;

No. 07–7412. HASTE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 234 Fed. Appx. 70;

No. 07–7477. TIGER *v.* UNITED STATES. C. A. 10th Cir. Reported below: 240 Fed. Appx. 283;

No. 07–7612. SMITH *v.* UNITED STATES. C. A. 8th Cir. Reported below: 231 Fed. Appx. 529;

No. 07–7619. COUNTS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 498 F. 3d 802;

No. 07–7693. HENDERSON *v.* UNITED STATES. C. A. 8th Cir. Reported below: 231 Fed. Appx. 531;

No. 07–7862. WALKER *v.* UNITED STATES. C. A. 8th Cir. Reported below: 494 F. 3d 688;

No. 07–8394. ARCHER *v.* UNITED STATES. C. A. 11th Cir. Reported below: 243 Fed. Appx. 564;

No. 07–8844. BAZEN *v.* UNITED STATES. C. A. 4th Cir.; and

No. 07–9115. MILLER *v.* UNITED STATES. C. A. 8th Cir. Reported below: 252 Fed. Appx. 766. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Begay* v. *United States*, *ante*, p. 137.

No. 07–8641. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 250 Fed. Appx. 84; and

No. 07–8795. MARTINEZ-REYES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 251 Fed. Appx. 938. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Gall* v. *United States*, 552 U. S. 38 (2007).

No. 07–9689. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kimbrough* v. *United States*, 552 U. S. 85 (2007).

Certiorari Dismissed

No. 07–10043. VIRAY *v.* MORA. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 255 Fed. Appx. 176.

Miscellaneous Orders

No. 07A769. SIBLEY *v.* FLORIDA BAR. Sup. Ct. Fla. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 07A785 (07–1188). WILLIAMS *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. App.

Div., Sup. Ct. N. Y., 1st Jud. Dept. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 07M63. MCCLASKEY *v.* LA PLATA R–II SCHOOL DISTRICT ET AL. Motion of petitioner for leave to proceed as a veteran denied.

No. 06–923. METROPOLITAN LIFE INSURANCE CO. ET AL. *v.* GLENN. C. A. 6th Cir. [Certiorari granted, 552 U. S. 1161.] Motion of Barry Schmittou for leave to intervene denied.

No. 07–952. DENTON, EXECUTOR OF THE ESTATE OF DENTON *v.* HYMAN. C. A. 2d Cir.; and

No. 07–956. BIOMEDICAL PATENT MANAGEMENT CORP. *v.* CALIFORNIA DEPARTMENT OF HEALTH SERVICES. C. A. Fed. Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 07–9643. FEATHERSTONE *v.* PFEIFFER. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 12, 2008, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 07–10138. IN RE GOODRICH; and

No. 07–10200. IN RE HARBIN. Petitions for writs of habeas corpus denied.

No. 07–1077. IN RE COLLARD;

No. 07–9466. IN RE BAILEY;

No. 07–9676. IN RE YOUNG;

No. 07–9716. IN RE RAMIREZ; and

No. 07–9830. IN RE DA VANG. Petitions for writs of mandamus denied.

No. 07–9804. IN RE HERBERT. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 06–11206. CHAMBERS *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 473 F. 3d 724.

No. 07–1059. UNITED STATES *v.* EURODIF S. A. ET AL.; and

No. 07–1078. USEC INC. ET AL. *v.* EURODIF S. A. ET AL. C. A. Fed. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 506 F. 3d 1051.

Certiorari Denied

No. 06–11830. WILLIAMS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 281 Ga. 87, 635 S. E. 2d 146.

No. 07–303. TAYLOR *v.* CRAWFORD, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 487 F. 3d 1072.

No. 07–395. ARTHUR *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 248 Fed. Appx. 128.

No. 07–802. MURPHY *v.* INTERNAL REVENUE SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 493 F. 3d 170.

No. 07–803. THACKER, TRUSTEE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 3d 984.

No. 07–820. ZAMORA *v.* MUKASEY, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 240 Fed. Appx. 150.

No. 07–943. LEBOON *v.* LANCASTER JEWISH COMMUNITY CENTER ASSN. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 3d 217.

No. 07–1060. TAKA ET AL. *v.* E. I. DU PONT DE NEMOURS & CO. ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 116 Haw. 277, 172 P. 3d 1021.

No. 07–1063. GRIFFIN INDUSTRIES, INC. *v.* IRVIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE GEORGIA DEPARTMENT OF AGRICULTURE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 496 F. 3d 1189.

No. 07–1067. HOLLAND *v.* LAYTON. Super. Ct. Pa. Certiorari denied. Reported below: 915 A. 2d 157.

No. 07–1073. JOHN CRANE, INC. *v.* ONEY, EXECUTOR OF THE ESTATE OF ONEY, DECEASED. Sup. Ct. Va. Certiorari denied.

No. 07–1108. BONNER *v.* PEAKE, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 497 F. 3d 1323.

No. 07–1123. ARNETT, ADMINISTRATOR OF THE ESTATE OF ARNETT *v.* COMBS, COMPTROLLER OF THE STATE OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 3d 1134.

No. 07–1128. MILES *v.* KLEIN, CHAIRMAN, NUCLEAR REGULATORY COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 739.

No. 07–1129. MORRISON *v.* CHAO, SECRETARY OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 210.

No. 07–1132. CITY OF SPARKS, NEVADA *v.* WHITE. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 3d 953.

No. 07–1134. KEARNS *v.* COMBA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 141.

No. 07–1135. MENDES *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 69 Mass. App. 1113, 870 N. E. 2d 676.

No. 07–1142. ARDITO *v.* NBC UNIVERSAL, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 249 Fed. Appx. 856.

No. 07–1147. PEQUENO *v.* SCHMIDT. C. A. 5th Cir. Certiorari denied. Reported below: 246 Fed. Appx. 274.

No. 07–1155. MUSSELMAN ET AL. *v.* NITCHMAN, DIRECTOR OF MAINTENANCE OF WASHINGTON STATE FERRIES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 651.

No. 07–1156. MICHAEL ET AL. *v.* GHEE, CHAIRPERSON, OHIO ADULT PAROLE AUTHORITY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 498 F. 3d 372.

No. 07–1177. PURITEC *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 153 Cal. App. 4th 1524, 64 Cal. Rptr. 3d 270.

No. 07–1196. SEGAL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 3d 826.

No. 07–1199. MICKENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 257 Fed. Appx. 461.

No. 07–6243. BIROS *v.* STRICKLAND, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 479 F. 3d 412.

No. 07–7023. GARTH *v.* BUSS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 470 F. 3d 702.

No. 07–7348. BERRY *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 3d 402.

No. 07–7641. MANAGO *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 963 So. 2d 907.

No. 07–7707. BEASON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 238 Fed. Appx. 854.

No. 07–7837. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 Fed. Appx. 233.

No. 07–7946. SALINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 Fed. Appx. 480.

No. 07–7963. WARD *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Sup. Ct. Mich. Certiorari denied.

No. 07–7986. LEDCKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 231 Fed. Appx. 507.

No. 07–8067. SANDERS *v.* NUNN ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–8191. SHENETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 240 Fed. Appx. 160.

No. 07–8277. ROACH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 502 F. 3d 425.

No. 07–8315. BOWER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS

DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 3d 459.

No. 07–8434. NICKLASSON *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 491 F. 3d 830.

No. 07–8457. THRASHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 483 F. 3d 977.

No. 07–8512. TURNER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 07–8541. BISHOP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–8787. COUSIN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 449 Mass. 809, 873 N. E. 2d 742.

No. 07–9096. CROWE *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 490 F. 3d 840.

No. 07–9133. GARCIA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 244 Fed. Appx. 376.

No. 07–9394. LAWRENCE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 240 S. W. 3d 912.

No. 07–9395. INCUMAA, AKA HARRISON *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 507 F. 3d 281.

No. 07–9401. TILLMAN *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–9402. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 969 So. 2d 938.

No. 07–9405. MORLEY *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 07–9407. MILLER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 07–9413. VIRRUELA LOPEZ *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–9414. LOMBARDELLI *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9415. JONES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9416. MILLER *v.* HALL, SUPERINTENDENT, TWO RIVERS CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 07–9431. HEARD *v.* HARRISON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 246 Fed. Appx. 449.

No. 07–9436. MERRIWEATHER *v.* FREDRICK ET AL. C. A. 4th Cir. Certiorari denied.

No. 07–9443. BETTY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 969 So. 2d 1011.

No. 07–9446. BABOS *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 07–9450. WEST *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 979.

No. 07–9451. TAYLOR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9452. UTOMI *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 243 S. W. 3d 75.

No. 07–9454. THREAT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 07–9455. TAEK SANG YOON *v.* GERVIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–9461. CHAMBERS *v.* ROZUM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9465. MUHAMMAD *v.* SISTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9471. CRAMER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 967 So. 2d 913.

No. 07–9472. CODY *v.* MICHIGAN. Cir. Ct. Kent County, Mich. Certiorari denied.

No. 07–9474. RHODES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 07–9476. REEVES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 07–9478. JOHNSON *v.* SUPREME COURT OF KANSAS. Sup. Ct. Kan. Certiorari denied.

No. 07–9480. JENKINS *v.* SUNCOAST CONSTRUCTION GROUP ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9483. ANDERSON *v.* MARTINO. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 07–9486. MIDDLETON *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 498 F. 3d 812.

No. 07–9490. FLEMMING *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 07–9503. CHERRY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 241 Fed. Appx. 990.

No. 07–9538. HARRIS *v.* MORROW. C. A. 9th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 250.

No. 07–9539. GERMAN *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 07–9547. QUEEN *v.* NALLEY. C. A. 10th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 895.

No. 07–9552. ELLIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 07–9615. OGHENESORO *v.* MUKASEY, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 07–9623. MENDOZA-LARES *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 07–9625. JOHNSON *v.* BOARD OF BAR OVERSEERS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 450 Mass. 165, 877 N. E. 2d 249.

No. 07–9628. MURPHY *v.* DENNY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 925.

No. 07–9652. HARMON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 07–9657. NELSON *v.* BOSTON POLICE DEPARTMENT ET AL. C. A. 1st Cir. Certiorari denied.

No. 07–9665. HILL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–9667. HALL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 937 A. 2d 139.

No. 07–9677. THOMAS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 600.

No. 07–9692. CARDONA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 700.

No. 07–9694. HAMILTON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 07–9699. KIPER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 123 Nev. 45, 210 P. 3d 743.

No. 07–9708. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 955.

No. 07–9709. SANCHEZ *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 07–9711. MORRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–9715. STAVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 07–9718. ROUNDTREE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 291.

No. 07–9719. BLACKTHORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–9720. FLORES SOLORZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 730.

No. 07–9737. CROSS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 555.

No. 07–9757. SHOAGA *v.* TENNESSEE (CHATTANOOGA STATE TECHNICAL COMMUNITY COLLEGE). Ct. App. Tenn. Certiorari denied.

No. 07–9761. ANDREOLA *v.* MORGAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–9766. LINTON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 07–9779. JONES *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9816. JACKSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 39 App. Div. 3d 394, 835 N. Y. S. 2d 77.

No. 07–9834. CAMPBELL ET UX. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 252 Fed. Appx. 326.

No. 07–9842. VELASQUEZ *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 07–9862. YELL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 242 S. W. 3d 331.

No. 07–9872. MARTIN *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied.

No. 07–9879. SCHAUB *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied.

No. 07–9907. YOUNG *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 07–9951. VEGA *v.* WILEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 104.

No. 07–9955. DE LA ROSA-HERNANDEZ, AKA DE LA ROSA *v.* UNITED STATES (Reported below: 313 Fed. Appx. 702); BARRON GONZALEZ, AKA BARRON-GONZALEZ, AKA GARZA, AKA GONZALEZ, AKA BARRON GONZALES, AKA GONZALEZ BARRON *v.* UNITED STATES (262 Fed. Appx. 686); CATOTA-MOLINA, AKA CATOTA MOLINA *v.* UNITED STATES (268 Fed. Appx. 325); RODRIGUEZ, AKA CASTILLO-RODRIGUEZ *v.* UNITED STATES (261 Fed. Appx. 653); LEDEZMA-ESPARZA *v.* UNITED STATES (251 Fed. Appx. 892); CARRILLO-RODRIGUEZ *v.* UNITED STATES (259 Fed. Appx. 671); LEON-CENTENO *v.* UNITED STATES (262 Fed. Appx. 683); HUERTA-VALLIN *v.* UNITED STATES (263 Fed. Appx. 430); and ZAVALA-JACOBO *v.* UNITED STATES (262 Fed. Appx. 658). C. A. 5th Cir. Certiorari denied.

No. 07–9963. RICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 300.

No. 07–9965. FEURTADO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 Fed. Appx. 355.

No. 07–9966. HADEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 661.

No. 07–9968. GRANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 07–9971. GONZALEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 07–9978. WHEELER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 693.

No. 07–9984. VIEUX *v.* WILLIAMSON, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 250 Fed. Appx. 519.

No. 07–9988. UNDERWOOD *v.* HOGSTEN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 251 Fed. Appx. 770.

No. 07–9989. WELLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 658.

No. 07–9991. SHURTZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 510 F. 3d 1242.

No. 07–9992. ROBINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 911.

No. 07–9994. CARMELO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 699.

No. 07–9999. BINTZLER *v.* MUKASEY, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 239 Fed. Appx. 271.

No. 07–10003. MESSIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10008. VARGAS-GALICIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 715.

No. 07–10010. RICHARDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 3d 622.

No. 07–10011. SANDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 510 F. 3d 788.

No. 07–10014. HOLGUIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 177.

No. 07–10020. FRANCIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10034. PRESCOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 548.

No. 07–10036. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 259 Fed. Appx. 448.

No. 07–10038. BERNAZAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 276 Fed. Appx. 888.

No. 07–10041. SPELLICY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 253 Fed. Appx. 147.

No. 07–10056. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 3d 905.

No. 07–10071. COFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 575.

No. 07–10073. CEJA-LICEA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 594.

No. 07–10080. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 611.

No. 07–10085. HAGEN-PORRAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 675.

No. 07–1053. BOUCHAT *v.* BON-TON DEPARTMENT STORES, INC., ET AL. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 506 F. 3d 315.

No. 07–1055. EXXON MOBIL CORP. *v.* GREFER ET AL. Ct. App. La., 4th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 965 So. 2d 511.

No. 07–1068. NUCLEONICS, INC. *v.* BENITEC AUSTRALIA, LTD. C. A. Fed. Cir. Motion of respondent for leave to file a brief in opposition under seal granted. Certiorari denied. Reported below: 495 F. 3d 1340.

No. 07–6234. COOEY *v.* STRICKLAND, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Motion of Brian Keith Moore et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 479 F. 3d 412.

No. 07–8336. NDONG-NTOUTOUM *v.* MUKASEY, ATTORNEY GENERAL. C. A. 5th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 242 Fed. Appx. 271.

No. 07–8946. VELAZQUEZ *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 216 Ariz. 300, 166 P. 3d 91.

Statement of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

While I agree with the Court's decision to deny certiorari in this case, it is appropriate to emphasize, as I have in the past, see, *e. g.*, *Knight* v. *Florida*, 528 U. S. 990 (1999) (opinion respecting denial of certiorari); *Singleton* v. *Commissioner*, 439 U. S. 940,

942 (1978) (same), that the denial of certiorari expresses no opinion on the merits of the underlying claim.

No. 07–9052. FRAZIER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 115 Ohio St. 3d 139, 873 N. E. 2d 1263.

Statement of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

While I agree with the Court's decision to deny certiorari in this case, it is appropriate to emphasize, as I have in the past, see, *e. g.*, *Knight* v. *Florida*, 528 U. S. 990 (1999) (opinion respecting denial of certiorari); *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (same), that the denial of certiorari expresses no opinion on the merits of the underlying claim.

Rehearing Denied

No. 06–10966. WALKER *v.* GEORGIA, 552 U. S. 833;

No. 07–710. ROSARIO ROBLES *v.* BOSCH ET AL., 552 U. S. 1181;

No. 07–875. WHITCOMBE ET UX. *v.* HENAK ET UX., 552 U. S. 1187;

No. 07–7829. BRADFORD *v.* UNITED STATES, 552 U. S. 1232;

No. 07–8346. ROBINSON *v.* NORTH CAROLINA, 552 U. S. 1208;

No. 07–8587. IN RE MITCHELL, 552 U. S. 1176;

No. 07–8588. TALON *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL., 552 U. S. 1247;

No. 07–8828. THORPE *v.* ERWIN, WARDEN, 552 U. S. 1266;

No. 07–9210. IN RE SESARIO DEPINEDA, 552 U. S. 1242; and

No. 07–9306. DADE *v.* UNITED STATES, 552 U. S. 1272. Petitions for rehearing denied.

No. 07–843. DRAIN ET UX. *v.* ACCREDITED HOME LENDERS, INC., ET AL., 552 U. S. 1251. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 07–7870. VANDIVERE *v.* UNITED STATES, 552 U. S. 1127. Motion for leave to file petition for rehearing denied.

APRIL 23, 2008

Dismissal Under Rule 46

No. 06–7725. CASTRO-JUAREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 191 Fed. Appx. 469.

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1107; an amendment to the Federal Rules of Civil Procedure, see *post*, p. 1151; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1157.)

APRIL 28, 2008

Certiorari Granted—Vacated and Remanded

No. 07–745. UNITED STATES *v.* ABC. C. A. 2d Cir. Motion of the Solicitor General for leave to file Appendix B to the petition for writ of certiorari under seal granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214 (2008). Reported below: 500 F. 3d 103.

No. 07–9799. GARCIA-LARA *v.* UNITED STATES. C. A. 10th Cir. Reported below: 499 F. 3d 1133; and

No. 07–9824. BEY *v.* UNITED STATES. C. A. 7th Cir. Reported below: 244 Fed. Appx. 57. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Gall* v. *United States*, 552 U. S. 38 (2007).

Certiorari Dismissed

No. 07–9568. LEWIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 07–10097. CENSKE *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. D–2452. IN RE DISBARMENT OF MIRARCHI. Disbarment entered. [For earlier order herein, see 552 U. S. 1278.]

No. 07M64. JONES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; and

No. 07M65. FLORES *v.* EVANS, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 07–9516. RAIMONDO *v.* DELECKE WELDING, INC., ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 19, 2008, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 07–10238. IN RE ROSE; and

No. 07–10283. IN RE NEALON. Petitions for writs of habeas corpus denied.

No. 07–9616. IN RE JAMISON; and

No. 07–10084. IN RE STONIER. Petitions for writs of mandamus denied.

No. 07–9985. IN RE XIANGYUAN ZHU. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

No. 07–10070. IN RE DADE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 07–812. CAMDEN-CLARK MEMORIAL HOSPITAL CORP. *v.* BOGGS, ADMINISTRATOR OF THE ESTATE OF BOGGS, DECEASED. Cir. Ct. Wood County, W. Va. Certiorari denied.

No. 07–847. BENDER *v.* DUDAS, DIRECTOR, PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 490 F. 3d 1361.

No. 07–948. NATIONAL CASUALTY CO. *v.* LOCKHEED MARTIN CORP. C. A. 4th Cir. Certiorari denied. Reported below: 503 F. 3d 351.

No. 07–963. EXCEL INNOVATIONS, INC., ET AL. *v.* INDIVOS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 3d 1086.

No. 07–964. CIAS INC. *v.* ALLIANCE GAMING CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 504 F. 3d 1356.

No. 07–980. FOGARTY ET AL. *v.* EVANS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 241 Fed. Appx. 542.

No. 07–988. DIAZ-RAMOS *v.* HYUNDAI MOTOR CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 501 F. 3d 12.

No. 07–1010. LEHMAN BROTHERS BANK, FSB *v.* STATE BANK COMMISSIONER. Sup. Ct. Del. Certiorari denied. Reported below: 937 A. 2d 95.

No. 07–1081. BROWN *v.* BLACKSHEAR, BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 241 Fed. Appx. 773.

No. 07–1091. BOYKINS *v.* BOYKINS. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 958 So. 2d 70.

No. 07–1092. PEREZ *v.* CITY OF MIAMI BEACH, FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 07–1113. PERSIK *v.* GROUP HEALTH COOPERATIVE INC. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 230 Fed. Appx. 709.

No. 07–1137. CALLAGHAN *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–1141. DONOVAN *v.* CAPLAN. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 450 Mass. 463, 879 N. E. 2d 117.

No. 07–1174. ALLEGRINO *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–1185. WIDTFELDT *v.* COUNCIL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT. Sup. Ct. Neb. Certiorari denied.

No. 07–1187. GREEN *v.* NORTH SEATTLE COMMUNITY COLLEGE. C. A. 9th Cir. Certiorari denied. Reported below: 237 Fed. Appx. 186.

No. 07–1188. WILLIAMS *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. App. Div.,

Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 33 App. Div. 3d 38, 819 N. Y. S. 2d 508.

No. 07–1204. MORROW *v.* MEEHAN, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 258 Fed. Appx. 492.

No. 07–1206. PIERCE *v.* DEPARTMENT OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 3d 184.

No. 07–1212. ARIZPE *v.* PETERS, SECRETARY OF TRANSPORTATION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 663.

No. 07–1217. MUTUC *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 07–1225. THOMPSON *v.* VIRGIN RECORDS AMERICA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 3d 724.

No. 07–1227. QUARZENSKI *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 305 Wis. 2d 525, 739 N. W. 2d 844.

No. 07–1231. ALTAMIRANO-QUINTERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 511 F. 3d 1087.

No. 07–1248. RHOADES *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 65 M. J. 393.

No. 07–8548. JACKSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 07–9021. VILLANUEVA-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 505 F. 3d 1.

No. 07–9171. SIBLEY *v.* SUPREME COURT OF FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9488. HERNANDEZ *v.* JONES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–9489. FRANKLIN *v.* LUNDQUIST, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–9499. DROPALSKI *v.* STEWART, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 07–9500. DAVIS *v.* PRUDDEN, SUPERINTENDENT, WOMEN'S EASTERN RECEPTION, DIAGNOSTIC AND CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 07–9502. CENICEROS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 07–9510. BAZZETTA *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 07–9511. BERKELEY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 07–9522. OROSCO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 375 Ill. App. 3d 1141, 945 N. E. 2d 696.

No. 07–9524. THOMAS *v.* MONROE. C. A. 6th Cir. Certiorari denied.

No. 07–9526. GRAYSON *v.* MITCHELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 32.

No. 07–9530. BUTLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 371 Ill. App. 3d 1200, 936 N. E. 2d 1226.

No. 07–9531. BOWERS *v.* SINGER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9532. BROWN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 07–9537. HORN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 3d 306.

No. 07–9548. REED *v.* COCKE COUNTY JUVENILE COURT ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–9549. SNIPES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–9550. CHERRY *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9553. DOOLEY *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9555. TEITGEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 07–9557. OJEDA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 371 Ill. App. 3d 1205, 936 N. E. 2d 1228.

No. 07–9560. STAYTON *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–9564. SANTIAGO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 909 A. 2d 887.

No. 07–9565. CAMPBELL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 07–9566. COCHRANE *v.* BURTT, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 235 Fed. Appx. 196.

No. 07–9575. DAVIS *v.* BAKER. C. A. 5th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 899.

No. 07–9576. CONWAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 373 Ill. App. 3d 1145, 943 N. E. 2d 330.

No. 07–9580. MAYOLO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9581. WESTERFIELD *v.* PENNER ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–9586. TEWOLDE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 07–9588. MOORE *v.* JENKINS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–9593. CAMPBELL *v.* MULLIN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 542.

No. 07–9619. ADAMS *v.* GEORGE. Super. Ct. Fulton County, Ga. Certiorari denied.

No. 07–9631. FUNCHES *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 264 Fed. Appx. 45.

No. 07–9639. DOAK *v.* BOBBY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–9649. PICOU *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 07–9680. RILEY *v.* SUPREME COURT OF LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 967 So. 2d 528.

No. 07–9688. TOELUPE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 808.

No. 07–9700. STERLING *v.* STEELE, SUPERINTENDENT, SOUTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 07–9704. GUINN *v.* WILKERSON ET AL. Ct. App. Miss. Certiorari denied. Reported below: 963 So. 2d 555.

No. 07–9722. FIELDING *v.* PATRICK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9763. BASEDEN *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 174 P. 3d 233.

No. 07–9767. LIMA *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 978 So. 2d 169.

No. 07–9782. BRYANT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 935 A. 2d 5.

No. 07–9832. HALEY *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied.

No. 07–9833. CLENNEY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 07–9850. ANDREWS *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9854. SAN PEDRO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9868. MEEKINS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 07–9897. LEWIS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 07–9916. MCCABE *v.* FORTNER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9920. STRUCK *v.* COOK COUNTY PUBLIC GUARDIAN. C. A. 7th Cir. Certiorari denied. Reported below: 508 F. 3d 858.

No. 07–9930. BLOUNT *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 151.

No. 07–9932. BAYNES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 935 A. 2d 3.

No. 07–9946. OLDS *v.* PURKETT, SUPERINTENDENT, EASTERN RECEPTION, DIAGNOSTIC AND CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 07–9950. ZUPPO *v.* CARROLL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9959. DANIEL *v.* HOECHST MARION ROUSSEL, DBA AVENTIS PHARMACEUTICALS, AKA SANOFI-AVENTIS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 692.

No. 07–9962. GARDNER *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 Fed. Appx. 594.

No. 07–9969. GOODWIN *v.* WADDINGTON, SUPERINTENDENT, WASHINGTON CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 07–9970. GUDALEFSKY *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION. C. A. 3d Cir. Certiorari denied. Reported below: 248 Fed. Appx. 351.

No. 07–9997. WASHINGTON *v.* JACKSON STATE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 244 Fed. Appx. 589.

No. 07–10001. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 365.

No. 07–10012. WINDLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 46 App. Div. 3d 326, 847 N. Y. S. 2d 533.

No. 07–10016. GORDON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 596 Pa. 231, 942 A. 2d 174.

No. 07–10032. DIPIETRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 606.

No. 07–10040. SLOAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 938 A. 2d 1121.

No. 07–10048. CRIDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 07–10050. EDGER *v.* MOORE, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 07–10057. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 281.

No. 07–10058. MARACALIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10066. BULLOCK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 510 F. 3d 342.

No. 07–10075. MCDANIEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 182.

No. 07–10078. LEVY *v.* UTTECHT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 07–10088. MILBOURNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 632.

No. 07–10090. DIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 797.

No. 07–10093. DABNEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 07–10095. CESAR-CASAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 07–10098. SPRATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 220.

No. 07–10099. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 784.

No. 07–10100. PENDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 576.

No. 07–10101. WINGFIELD *v.* PATTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10107. BRASWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 3d 1147.

No. 07–10115. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10117. SPELLS *v.* CITY OF NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 07–10119. ROSS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 3d 702.

No. 07–10128. HUGHES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 273 Fed. Appx. 587.

No. 07–10129. GREEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 601.

No. 07–10130. MCGOWAN *v.* WORTHINGTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10135. FOX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 183.

No. 07–10136. DAWSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 578.

No. 07–10141. FORD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 931 A. 2d 1045.

No. 07–10143. GARNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10147. HOLLINGSWORTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 240 Fed. Appx. 806.

No. 07–10149. MACIAS-VALENCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 510 F. 3d 1012.

No. 07–10150. LARA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 723.

No. 07–10152. ARREDONDO *v.* GULF BEND CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 627.

No. 07–10154. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 769.

No. 07–10157. CORLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 936 A. 2d 837.

No. 07–10158. FORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 248 Fed. Appx. 768.

No. 07–10161. WATKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 Fed. Appx. 975.

No. 07–10162. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 251.

No. 07–10163. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 254 Fed. Appx. 993.

No. 07–10167. GUILLEN-ZAPATA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 240 Fed. Appx. 797.

No. 07–10171. HEDGEPETH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 07–10177. LOVE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 134.

No. 07–10181. WEBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10189. ALCANTARA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 174.

No. 07–10190. CUEVAS-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 57.

No. 07–10192. HESS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10193. HARRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10197. GAMINO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 844.

No. 07–10204. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 250 Fed. Appx. 522.

No. 07–10230. WARREN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 235 Fed. Appx. 435.

Rehearing Denied

No. 07–968. GOMEZ *v.* FLORIDA, 552 U. S. 1295;

No. 07–8183. ALEMAN *v.* HUBERT ET AL., 552 U. S. 1200;

No. 07–8235. CLEVELAND ET VIR *v.* OKLAHOMA ET AL., 552 U. S. 1202;

No. 07–8329. BOWMAN *v.* FLORIDA, 552 U. S. 1207;

No. 07–8485. TERRY *v.* GEORGIA, 552 U. S. 1245;

No. 07–8665. OCHOA CANALES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 552 U. S. 1263;

No. 07–8684. IN RE STAFFNEY ET AL., 552 U. S. 1176;

No. 07–8699. IN RE RIVERA, 552 U. S. 1255;

No. 07–8832. LAWRENCE ET AL. *v.* MCCALL, JUDGE, DISTRICT COURT OF OKLAHOMA, FIFTH JUDICIAL DISTRICT, ET AL., 552 U. S. 1248;

No. 07–8853. ST. LOUIS *v.* DELAWARE, 552 U. S. 1267;

No. 07–8958. SUEING *v.* MICHIGAN, 552 U. S. 1268;

No. 07–9062. CHAUX-SARRIA *v.* UNITED STATES, 552 U. S. 1238;

No. 07–9293. MILTON *v.* PEAKE, SECRETARY OF VETERANS AFFAIRS, 552 U. S. 1288; and

No. 07–9433. IN RE MARDIS, 552 U. S. 1255. Petitions for rehearing denied.

APRIL 30, 2008

Dismissals Under Rule 46

No. 07–9724. GRAY *v.* MCCANN, WARDEN. Sup. Ct. Ill. Certiorari dismissed under this Court's Rule 46.

No. 07–9725. GRAY *v.* MCCANN, WARDEN. Sup. Ct. Ill. Certiorari dismissed under this Court's Rule 46.

MAY 6, 2008

Certiorari Denied

No. 07–10760 (07A880). LYND *v.* HALL, WARDEN. Super. Ct. Butts County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MAY 8, 2008

Dismissal Under Rule 46

No. 07–1243. MICROSOFT CORP. *v.* I4 TECHNOLOGIES, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 507 F. 3d 1340.

MAY 12, 2008

Affirmed for Absence of Quorum

No. 07–919. AMERICAN ISUZU MOTORS, INC., ET AL. *v.* NTSEBEZA ET AL. C. A. 2d Cir. THE CHIEF JUSTICE, JUSTICE KENNEDY, JUSTICE BREYER, and JUSTICE ALITO took no part in the consideration or decision of this petition. Because of this absence of a quorum, 28 U. S. C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of Court, the judgment is affirmed under 28 U. S. C. § 2109, which provides that under these circumstances "the court shall enter its order affirming the judgment of the same court from which the case was brought for review with

the same effect as upon affirmance by an equally divided court." Reported below: 504 F. 3d 254.

Certiorari Granted—Vacated and Remanded

No. 07–8178. BENNETT *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed April 4, 2008. Reported below: 219 Fed. Appx. 265.

No. 07–8709. ALVARADO-MOLINA *v.* UNITED STATES. C. A. 10th Cir. Reported below: 250 Fed. Appx. 905;

No. 07–8833. RODRIGUEZ-IZAGUIRRE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 250 Fed. Appx. 634;

No. 07–8856. MARMOLEJO-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 257 Fed. Appx. 812;

No. 07–8859. KITTREDGE *v.* UNITED STATES. C. A. 10th Cir. Reported below: 251 Fed. Appx. 569;

No. 07–8907. ANDRADE-REAL *v.* UNITED STATES. C. A. 5th Cir. Reported below: 251 Fed. Appx. 926;

No. 07–8949. DEL BAL-VILLEGAS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 251 Fed. Appx. 968;

No. 07–8963. MARTINEZ-CORPUS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 251 Fed. Appx. 958;

No. 07–8971. ROMERO-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 251 Fed. Appx. 959; and

No. 07–9172. ESCARENO SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 507 F. 3d 877. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Gall* v. *United States*, 552 U. S. 38 (2007).

Certiorari Dismissed

No. 07–9663. FEURTADO *v.* MCNAIR ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 227 Fed. Appx. 303.

No. 07–9980. STEPHEN *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule

39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 07M66. MCINTYRE-HANDY *v.* APAC CUSTOMER SERVICES, INC.; and

No. 07M67. LUCKETTE *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 07–901. OREGON *v.* ICE. Sup. Ct. Ore. [Certiorari granted, 552 U. S. 1256.] Motion of respondent for appointment of counsel granted. Ernest G. Lannet, Esq., of Salem, Ore., is appointed to serve as counsel for respondent in this case.

No. 07–7950. STEELE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [552 U. S. 1173] denied.

No. 07–9793. IWANEJKO *v.* COHEN & GRIGSBY, P. C., ET AL. C. A. 3d Cir.;

No. 07–10214. IN RE WAXMAN; and

No. 07–10375. IN RE FARLEY. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 2, 2008, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 07–10553. IN RE GINCO. Motion of petitioner to expedite consideration of petition for writ of mandamus denied.

No. 07–10233. IN RE DAVIES; and

No. 07–10439. IN RE NEDEA. Petitions for writs of habeas corpus denied.

No. 07–10488. IN RE DEPINEDA. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 07–1131. IN RE SIMMONS;
No. 07–1186. IN RE COLLARD;
No. 07–8921. IN RE EVANS-MARTINEZ;
No. 07–9591. IN RE STOLLER;
No. 07–9661. IN RE WILLIAMS;
No. 07–9791. IN RE SHELL; and
No. 07–10258. IN RE RAZA ET UX. Petitions for writs of mandamus denied.

No. 07–9592. IN RE STOLLER. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 07–1223. BELL *v.* KELLY, WARDEN. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 260 Fed. Appx. 599.

Certiorari Denied

No. 07–756. YI QIANG YANG *v.* MUKASEY, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 494 F. 3d 1311.

No. 07–912. APOTEX, INC., ET AL. *v.* ABBOTT LABORATORIES. C. A. Fed. Cir. Certiorari denied. Reported below: 503 F. 3d 1372.

No. 07–923. TAE KYONG KIM *v.* MUKASEY, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied.

No. 07–961. CENTERIOR ENERGY CORP. ET AL. *v.* MIKULSKI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 501 F. 3d 555.

No. 07–995. SANDERS *v.* BROWN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 3d 903.

No. 07–1003. SLEEPER FARMS ET AL. *v.* AGWAY, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 506 F. 3d 98.

No. 07–1006. VYTA CORP., FKA NANOPIERCE TECHNOLOGIES, INC., ET AL. *v.* DEPOSITORY TRUST & CLEARING CORP. ET AL.

Sup. Ct. Nev. Certiorari denied. Reported below: 123 Nev. 362, 168 P. 3d 73.

No. 07–1020. GRAHAM *v.* AT&T MOBILITY, LLC. C. A. 7th Cir. Certiorari denied. Reported below: 247 Fed. Appx. 26.

No. 07–1028. PANORAMA RECORDS, INC. *v.* ZOMBA ENTERPRISES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 491 F. 3d 574.

No. 07–1037. CARLS ET AL. *v.* BLUE LAKE HOUSING AUTHORITY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 07–1070. ORMCO CORP. *v.* ALIGN TECHNOLOGY, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 498 F. 3d 1307.

No. 07–1104. PEETE *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 3d 217.

No. 07–1118. SCOTT *v.* QUIGLEY, SENIOR JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, PERRY COUNTY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 248 Fed. Appx. 453.

No. 07–1119. PEET ET AL. *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 502 F. 3d 557.

No. 07–1120. TOYOTA MOTOR CORP. ET AL. *v.* PAICE LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 504 F. 3d 1293.

No. 07–1127. ST. JOHN'S UNITED CHURCH OF CHRIST ET AL. *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 3d 616.

No. 07–1133. SOWARDS *v.* CITY OF MILPITAS, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 402.

No. 07–1136. BANUSHI *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 07–1138. GOULD *v.* FLORIDA BAR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 208.

No. 07–1139. PARKER, ADMINISTRATOR OF THE ESTATE OF PARKER, DECEASED *v.* CHICAGO TRANSIT AUTHORITY. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 373 Ill. App. 3d 1143, 943 N. E. 2d 329.

No. 07–1144. STERNGASS *v.* TOWN OF WOODBURY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 251 Fed. Appx. 21.

No. 07–1146. MORGAN *v.* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES. C. A. 6th Cir. Certiorari denied. Reported below: 509 F. 3d 273.

No. 07–1151. LOVELL ET AL. *v.* LEVIN, TAX COMMISSIONER OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 116 Ohio St. 3d 200, 877 N. E. 2d 667.

No. 07–1163. TSA STORES, INC. *v.* FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 957 So. 2d 25.

No. 07–1171. SAMMANN ET AL. *v.* MAYER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 519.

No. 07–1172. BAKHTIARI *v.* LUTZ ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 507 F. 3d 1132.

No. 07–1183. SHAFIQ *v.* MUKASEY, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 249 Fed. Appx. 241.

No. 07–1184. PERDOMO *v.* MUKASEY, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 769.

No. 07–1192. DAR DAR *v.* ASSOCIATED OUTDOOR CLUBS, INC., DBA TAMPA GREYHOUND TRACK. C. A. 11th Cir. Certiorari denied. Reported below: 248 Fed. Appx. 82.

No. 07–1203. CADLE CO. *v.* DENNIS. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 3d 483.

No. 07–1210. EVANS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF ROCK HILL LOCAL SCHOOL DISTRICT *v.* JENKINS, INDIVIDUALLY AND AS LEGAL GUARDIAN OF

RATCLIFF. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 3d 580.

No. 07–1211. CALDERON *v.* HOGAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–1241. TERRELL *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 07–1250. MEDICAL TRANSPORTATION MANAGEMENT CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 506 F. 3d 1364.

No. 07–1260. DOHAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 508 F. 3d 989.

No. 07–1266. DOMINGUEZ-RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 270 Fed. Appx. 750.

No. 07–1277. LOMAZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 833.

No. 07–1291. ABREU *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 3d 62.

No. 07–7597. ENGLAND *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 242 Fed. Appx. 155.

No. 07–7745. STEVENS *v.* BUSS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 3d 883.

No. 07–8121. ANKENY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 3d 829.

No. 07–8129. WALLACE *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE. C. A. 3d Cir. Certiorari denied. Reported below: 243 Fed. Appx. 710.

No. 07–8218. HINOJOSA-ECHAVARRIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 109.

No. 07–8441. SAMPSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 486 F. 3d 13.

No. 07–8500. MORAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 503 F. 3d 1135.

No. 07–8854. WALSH *v.* WOODS, FKA WALSH. Ct. App. S. C. Certiorari denied. Reported below: 371 S. C. 319, 638 S. E. 2d 85.

No. 07–8894. BELL-BEY *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 499 F. 3d 752.

No. 07–9009. STEPHENS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 9 So. 3d 576.

No. 07–9100. ORTIZ *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 3d 492.

No. 07–9116. MURRAY *v.* EDWARDS COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 248 Fed. Appx. 993.

No. 07–9266. COUSAR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 293 Pa. 204, 928 A. 2d 1025.

No. 07–9506. MASON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 160 Wash. 2d 910, 162 P. 3d 396.

No. 07–9603. CHAVEZ *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9609. SMITH *v.* DINWIDDIE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 510 F. 3d 1180.

No. 07–9621. TARVIN *v.* MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied.

No. 07–9636. HAMM *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 07–9642. COOPER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9645. FOLEY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 969 So. 2d 283.

No. 07–9650. OLIVER *v.* LONG ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–9651. JACKSON *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9654. TESLEY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 07–9655. MOSES *v.* TERRITORY OF GUAM. Sup. Ct. Guam. Certiorari denied. Reported below: 2007 Guam 5.

No. 07–9659. THOMPSON *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 742 N. W. 2d 839.

No. 07–9662. GREEN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 07–9664. FOSTER *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9666. HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 07–9668. CHILDS *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 07–9670. SHELL *v.* DEVRIES ET AL. C. A. 10th Cir. Certiorari denied.

No. 07–9673. SIMEONE *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9679. TINSLEY *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–9682. ROSALES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9685. BROOKINS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9693. DODSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 07–9698. JACKSON *v.* SMITH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 841.

No. 07–9701. BENAVIDES *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 07–9705. ROHNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–9706. THOMAS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9714. MATHIS *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9717. HERRERA RIVERA *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9721. FISHER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 07–9727. FUNCHES *v.* CHANDLER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–9728. HENDERSON *v.* BAKKER. C. A. 6th Cir. Certiorari denied.

No. 07–9734. CELLEY *v.* STEVENS. Ct. App. Mich. Certiorari denied.

No. 07–9738. HEINLE *v.* CONERLY, ACTING WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–9743. SMITH *v.* HONOLULU POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–9747. LANGFORD *v.* ALMAGER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9749. PAGE *v.* ST. LAWRENCE ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9755. OLSEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 07–9758. STRUCK *v.* HARRIS (two judgments). App. Ct. Ill., 1st Dist. Certiorari denied.

No. 07–9764. MARTIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–9770. VAN DUSEN *v.* SIRMONS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 Fed. Appx. 562.

No. 07–9774. THOMPSON *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 07–9775. URLACHER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 07–9776. TARKINGTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–9777. LAGOYE *v.* MUKASEY, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 07–9778. LANG *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 563.

No. 07–9780. ABIODUN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 726.

No. 07–9781. BROWN *v.* COURT OF CRIMINAL APPEALS OF OKLAHOMA. Sup. Ct. Okla. Certiorari denied.

No. 07–9784. BARNHART *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9789. ERICKSON *v.* CITY OF BOSTON, MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 450 Mass. 1010, 877 N. E. 2d 545.

No. 07–9792. RUFF *v.* BRUNSMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–9794. MOORE *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 601.

No. 07–9797. THOMAS *v.* MICHIGAN. Cir. Ct. Muskegon County, Mich. Certiorari denied.

No. 07–9798. LITTLE *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–9801. FRANCES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 970 So. 2d 806.

No. 07–9802. GILES *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 239 Fed. Appx. 145.

No. 07–9807. DALY *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 285 Ga. App. 808, 648 S. E. 2d 90.

No. 07–9810. WARREN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9811. VALENTINE *v.* NETTLES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 563.

No. 07–9815. KILBOURNE ET AL. *v.* CITY OF STILLWATER, MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 07–9823. BAGLEY *v.* BOURNE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 239 Fed. Appx. 725.

No. 07–9825. BISHOP *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9826. BLAKE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 972 So. 2d 839.

No. 07–9858. STEPHENS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 874 N. E. 2d 1027.

No. 07–9864. ZUCKER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–9866. MEDINA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–9882. FRANQUI *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 965 So. 2d 22.

No. 07–9886. REHMAN *v.* BOARD OF IMMIGRATION APPEALS. C. A. 2d Cir. Certiorari denied. Reported below: 239 Fed. Appx. 645.

No. 07–9902. PINEDA *v.* CHW CENTRAL CALIFORNIA MERCY HOSPITAL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 07–9924. MATHIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 973 So. 2d 1122.

No. 07–9926. LEE *v.* KING. C. A. 5th Cir. Certiorari denied.

No. 07–9948. WALTERS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9954. HON LAU *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–9983. RUCKMAN *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 07–10004. ADKINS *v.* KONTEH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10013. JOHNSON *v.* STATE ATTORNEY, SUMTER COUNTY, FLORIDA. Certiorari denied.

No. 07–10017. GARRY *v.* MCCANN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–10031. DAWSON *v.* JOHNSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 713.

No. 07–10051. HARVESTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 966 So. 2d 172.

No. 07–10053. WADE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 175 Md. App. 783.

No. 07–10064. BLACKWELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10065. LINH BAO *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied.

No. 07–10072. ECHOLS *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 511 F. 3d 783.

No. 07–10082. SMITH *v.* DELAWARE COUNTY COURT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 260 Fed. Appx. 454.

No. 07–10089. CHISUM *v.* JUNELL, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 07–10102. WINDING *v.* KING, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 07–10109. WARLICK *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 973 So. 2d 1132.

No. 07–10110. WARLICK *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 973 So. 2d 1132.

No. 07–10120. LAW *v.* WESLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 832.

No. 07–10125. COOPER *v.* CITY OF PLANO, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 680.

No. 07–10132. RADOCESKY *v.* MUNLEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 247 Fed. Appx. 363.

No. 07–10160. GARCIA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10174. DILLON *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 07–10182. HUBLER *v.* DOUGLAS COUNTY DISTRICT COURT. Sup. Ct. Colo. Certiorari denied.

No. 07–10184. SHELBORNE *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 223 Fed. Appx. 990.

No. 07–10203. SHANKLIN *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 751.

No. 07–10213. CAPPOCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 247 Fed. Appx. 311.

No. 07–10215. WATTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 07–10219. CONCES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 507 F. 3d 1028.

No. 07–10232. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 237 Fed. Appx. 888.

No. 07–10235. TOVAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 656.

No. 07–10243. GRAHAM *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 269 Fed. Appx. 785.

No. 07–10246. EUGENE, AKA LOUSLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 244 Fed. Appx. 964.

No. 07–10250. GONZALEZ-SINSOON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 692.

No. 07–10251. STAMPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 795.

No. 07–10256. PENA-PERETE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 22.

No. 07–10257. WIEDERHOLD *v.* FOX, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 903.

No. 07–10260. WALTERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 244 Fed. Appx. 623.

No. 07–10262. BYRD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 270 Fed. Appx. 236.

No. 07–10267. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 574.

No. 07–10269. BAREFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 575.

No. 07–10271. SCHLAKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 568.

No. 07–10277. JUAREZ-DUARTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 3d 204.

No. 07–10278. MCGILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 531.

No. 07–10279. OLMEDO-SALINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 514.

No. 07–10281. SANCHEZ-ARIZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 268 Fed. Appx. 332.

No. 07–10286. HUNTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 07–10287. MATHIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10289. DWYER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 275 Fed. Appx. 269.

No. 07–10291. RAY *v.* HAMIDULLAH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 490.

No. 07–10294. BOGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 620.

No. 07–10295. ARENAL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 264 Fed. Appx. 891.

No. 07–10296. ALONZO-UBINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 256.

No. 07–10297. BANDJAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 07–10298. BIEGANOWSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10299. BROWN *v.* DONALD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–10300. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 271 Fed. Appx. 318.

No. 07–10301. WATSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 07–10302. UNDERWOOD *v.* HOGSTEN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 251 Fed. Appx. 770.

No. 07–10305. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10309. GARCIA-MIRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 679.

No. 07–10314. JIMENEZ-SANDOVAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 130.

No. 07–10317. MCGEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 259 Fed. Appx. 380.

No. 07–10318. MENDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 514 F. 3d 1035.

No. 07–10325. VALMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 245 Fed. Appx. 720.

No. 07–10328. GRIFFIN *v.* HOGSTEN, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 07–10329. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 107.

No. 07–10332. THOMAS *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 07–10333. MORALES-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 07–10334. PHILLIPS *v.* UNITED STATES (two judgments). C. A. 11th Cir. Certiorari denied. Reported below: 177 Fed. Appx. 942 (first judgment); 262 Fed. Appx. 183 (second judgment).

No. 07–10335. BAHRS *v.* MCCANN, WARDEN, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 07–10339. MEDINA-FLORES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 271 Fed. Appx. 827.

No. 07–10340. OTTERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 506 F. 3d 1098.

No. 07–10343. STAFFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10345. KIRSCHENMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 819.

No. 07–10346. COLBERT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 466.

No. 07–10349. PORTOCARRERO CANA *v.* UNITED STATES; MURILLO KACHIMBO *v.* UNITED STATES; GOMES RIVAS *v.* UNITED STATES; and AGUIRRE ZATISAVAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10353. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 239 Fed. Appx. 553.

No. 07–10354. SMOLKA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 578.

No. 07–10355. RONQUILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 3d 744.

No. 07–10356. ESPINOZA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 514 F. 3d 209.

No. 07–10357. CASTRO-DE LOS SANTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 681.

No. 07–10358. DOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 86.

No. 07–10359. COLLINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 744.

No. 07–10360. SPEIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 07–10362. MALCOLM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 681.

No. 07–10363. SONORA-CHAVARIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 235 Fed. Appx. 674.

No. 07–10365. CORTES-SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 312 Fed. Appx. 155.

No. 07–10367. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 242 Fed. Appx. 352.

No. 07–10368. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 07–10371. BARLOW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 266 Fed. Appx. 209.

No. 07–10376. GARCIA-MAEDA, AKA ESTRADA MONTONYO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 582.

No. 07–10380. SALAS-CARDENAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 571.

No. 07–10381. ROGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 849.

No. 07–10383. SAMET *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 07–10386. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 512 F. 3d 1268.

No. 07–10387. LEVINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10388. WHITEHEAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 777.

No. 07–10389. NUNEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 739.

No. 07–10390. VAUGHN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 761.

No. 07–10391. YATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 272 Fed. Appx. 541.

No. 07–10393. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 3d 726.

No. 07–10395. LUGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 251 Fed. Appx. 695.

No. 07–10398. ANDREWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 248 Fed. Appx. 480.

No. 07–10399. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 740.

No. 07–10401. BARLOW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 270 Fed. Appx. 441.

No. 07–10402. BROWN *v.* RIVERA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 269 Fed. Appx. 266.

No. 07–10412. STEIGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10414. AWALA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 260 Fed. Appx. 469.

No. 07–10415. LEONARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 07–10416. HOURANI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 239 Fed. Appx. 195.

No. 07–10420. ALDEA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 261 Fed. Appx. 422.

No. 07–10421. BARCLAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 942 A. 2d 1190.

No. 07–10422. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10423. GLADNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 681.

No. 07–10424. ISLAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 647.

No. 07–1016. BUSS, SUPERINTENDENT, INDIANA STATE PRISON *v.* STEVENS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 489 F. 3d 883.

No. 07–1043. NEW YORK *v.* HILL. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 9 N. Y. 3d 189, 879 N. E. 2d 152.

No. 07–1130. FROELICH *v.* LEWIS LAW FIRM, PC. Sup. Ct. Va. Motion of petitioner to remand denied. Certiorari denied.

No. 07–1148. RICHARDS *v.* DUKE UNIVERSITY ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 07–9250. RECHANIK *v.* MICROSOFT CORP. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 249 Fed. Appx. 476.

No. 07–9690. WYATT *v.* ZUCKERMAN ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

Rehearing Denied

No. 07–749. WALKER *v.* UNITED STATES, 552 U. S. 1257;

No. 07–824. ALSTON *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, PENNSYLVANIA, 552 U. S. 1186;

No. 07–870. WHITESIDE *v.* CARR, HUNT & JOY, LLP, ET AL., 552 U. S. 1257;

No. 07–911. BISHOP *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, 552 U. S. 1258;

No. 07–926. ROMAN *v.* ROMAN, 552 U. S. 1258;

No. 07–992. CAMPBELL *v.* COMMISSIONER OF INTERNAL REVENUE, 552 U. S. 1259;

No. 07–7875. BEA *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 552 U. S. 1191;

No. 07–7991. JACOB ET AL. *v.* HOUSTON, 552 U. S. 1194;

No. 07–8100. HASSETT *v.* KEARNEY, WARDEN, ET AL., 552 U. S. 1197;

No. 07–8148. PRIDGEN *v.* NISH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT WAYMART, ET AL., 552 U. S. 1199;

No. 07–8184. WHEELER *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL., 552 U. S. 1261;

No. 07–8200. BELL *v.* LYONS ET AL., 552 U. S. 1201;

No. 07–8246. FOX *v.* FISCHER, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, 552 U. S. 1203;

No. 07–8481. ANDERSON *v.* DONALD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL., 552 U. S. 1245;

No. 07–8616. PRATHER *v.* TEXAS, 552 U. S. 1262;

No. 07–8619. CLARKE *v.* CALIFORNIA, 552 U. S. 1262;

No. 07–8721. GAUTIER *v.* RHODE ISLAND ET AL., 552 U. S. 1235;

No. 07–8815. DARLINGTON *v.* DARLINGTON, 552 U. S. 1266;

No. 07–8941. SPEARS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL., 552 U. S. 1267;

No. 07–9015. GIBBS *v.* PHELPS, WARDEN, ET AL., 552 U. S. 1268;

No. 07–9030. ANOU LO *v.* ENDICOTT, WARDEN, 552 U. S. 1249;

No. 07–9043. WRIGHT *v.* DALEY ET AL., 552 U. S. 1299;

No. 07–9044. KOENIG *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, 552 U. S. 1299;

No. 07–9063. FASHEWE *v.* UNITED STATES, 552 U. S. 1238;

No. 07–9158. FAGAN *v.* UNITED STATES, 552 U. S. 1250;

No. 07–9160. HOLLOMAN *v.* FLORIDA, 552 U. S. 1287; and

No. 07–9493. FERGUSON *v.* UNITED STATES, 552 U. S. 1290. Petitions for rehearing denied.

No. 07–907. JOHNSON *v.* GADSON ET AL., 552 U. S. 1258. Motion of petitioner to defer consideration of petition for rehearing denied. Petition for rehearing denied.

MAY 13, 2008

Dismissal Under Rule 46

No. 07–1024. SCREEN ACTORS GUILD, INC., ET AL. *v.* METOYER. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 504 F. 3d 919.

MAY 16, 2008

Dismissals Under Rule 46

No. 07–9814. TYLER *v.* MCCANN, WARDEN. Sup. Ct. Ill. Certiorari dismissed under this Court's Rule 46.

No. 07–10313. TYLER *v.* MCCANN, WARDEN. Sup. Ct. Ill. Certiorari dismissed under this Court's Rule 46.

MAY 19, 2008

Dismissal Under Rule 46

No. 07–1000. THINKSTREAM, INC., ET AL. *v.* ADAMS ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 251 Fed. Appx. 282.

Certiorari Granted—Vacated and Remanded

No. 07–6054. GAMBA *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gonzalez* v. *United States*, *ante*, p. 242. JUSTICE STEVENS, JUSTICE SCALIA, and JUSTICE ALITO would deny the petition for writ of certiorari. Reported below: 483 F. 3d 942.

No. 07–10259. TOWNSEND *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gall* v. *United States*, 552 U. S. 38 (2007), and *Kimbrough* v. *United States*, 552 U. S. 85 (2007). Reported below: 252 Fed. Appx. 20.

Certiorari Dismissed

No. 07–9837. CHARLES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 07–10446. FAZZINI *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this

Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 263 Fed. Appx. 483.

Miscellaneous Orders

No. 07A304. EMMETT *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Motion to vacate the stay of execution of sentence of death, issued by this Court on October 17, 2007 [552 U. S. 987], granted.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

In 2001, Christopher Scott Emmett was convicted of capital murder and sentenced to death. On April 19, 2007, Emmett filed suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, asserting that Virginia's lethal injection protocol violated the Eighth Amendment. The District Court for the Eastern District of Virginia granted summary judgment to the State, finding that Emmett failed to submit sufficient evidence to show that Virginia's method of execution created a "substantial risk that he will experience unnecessary pain that is serious or significant" or that prison officials were deliberately indifferent to such a risk. 511 F. Supp. 2d 634, 640, and n. 5 (2007) (internal quotation marks omitted).

On September 25, 2007, five days after the District Court denied relief, Emmett filed a notice of appeal with the Fourth Circuit. On that same date, this Court granted certiorari in *Baze* v. *Rees*, 551 U. S. 1192 (2007), to consider the constitutionality of Kentucky's lethal injection protocol. As Emmett's October 17 execution date approached (without a final decision having been rendered by the Fourth Circuit), Emmett filed an application for a stay of execution in this Court. We granted his application and entered a stay "pending final disposition of the appeal by the United States Court of Appeals for the Fourth Circuit or further order of this Court." 552 U. S. 987.

The Commonwealth of Virginia has moved to vacate that stay. The Fourth Circuit has not rendered a final disposition on the appeal, but it has acted swiftly in the month since we issued our

decision in *Baze*, *ante*, p. 35; it requested additional briefing on the impact of *Baze* the day after that opinion issued, received those briefs on May 2, and heard oral argument on Wednesday, May 14. I therefore believe we should leave our stay in place until the Fourth Circuit has an adequate opportunity to render a decision on the merits of Emmett's claim. The parties' filings with this Court highlight the existence of factual disputes concerning Virginia's lethal injection protocol, including whether it is substantially similar to the Kentucky protocol we declined to strike down in *Baze*. Because the Fourth Circuit has the trial record before it, and also has the benefit of extensive briefing and argument, it is in a significantly better position than we are to make these factual judgments when it rules on the merits of Emmett's appeal.

Although the parties are of course free to request a stay from the Fourth Circuit—a request that the court may well grant in order to complete its consideration of Emmett's appeal without the pressure of a looming execution date—I would not require the parties to shoulder the additional burden of filing superfluous papers when simply leaving our stay in place until final disposition by the Court of Appeals would also give the Fourth Circuit an opportunity to consider these important issues in the regular course. Accordingly, I respectfully dissent.

No. 07M68. KINDER CANAL CO., INC., ET AL. *v.* JOHANNS, SECRETARY OF AGRICULTURE. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 07–8950. THOMPSON *v.* DAVIS, WARDEN. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [552 U. S. 1278] denied.

No. 07–9179. STRINGER *v.* AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA ET AL. Ct. App. Miss. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [552 U. S. 1306] denied.

No. 07–9195. MURRAY *v.* SOUTER, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [552 U. S. 1278] denied. JUSTICE SOUTER took no part in the consideration or decision of this motion.

No. 07–9808. HEGHMANN ET UX. *v.* TOWN OF RYE, NEW HAMPSHIRE, ET AL. C. A. 1st Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 9, 2008, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 07–10503. IN RE BAILEY; and

No. 07–10620. IN RE GOLDEN. Petitions for writs of habeas corpus denied.

No. 07–10621. IN RE HADIX. Petition for writ of habeas corpus denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 07–1179. IN RE FLORANCE. Petition for writ of mandamus denied.

Certiorari Denied

No. 07–639. ZHEN HUA DONG *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 494 F. 3d 296.

No. 07–937. CITY NATIONAL BANK OF WEST VIRGINIA *v.* DEPARTMENT OF AGRICULTURE, FARM SERVICE AGENCY. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 3d 236.

No. 07–1029. FORBES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 249 Fed. Appx. 233.

No. 07–1089. SMITH *v.* BARROW. C. A. 5th Cir. Certiorari denied.

No. 07–1164. SMITH *v.* BROWN ET AL. Ct. App. D. C. Certiorari denied. Reported below: 930 A. 2d 249.

No. 07–1168. JOHNSON *v.* GADSON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 252 Fed. Appx. 321.

No. 07–1170. R AND J MURRAY, LLC *v.* MURRAY COUNTY, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 282 Ga. 740, 653 S. E. 2d 720.

No. 07–1173. JOU *v.* ARGONAUT INSURANCE CO. ET AL. Int. Ct. App. Haw. Certiorari denied. Reported below: 113 Haw. 507, 155 P. 3d 690.

No. 07–1191. BAUTISTA RIVERA *v.* SNOW ET VIR. App. Div., Super. Ct. Cal., County of Solano. Certiorari denied.

No. 07–1208. SLAGTER *v.* STONECRAFT, LLC. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 656.

No. 07–1218. HEIM *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied.

No. 07–1219. KARPOVA *v.* PAULSON, SECRETARY OF THE TREASURY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 3d 262.

No. 07–1230. R. M. INVESTMENT CO., DBA TRAPPERS LAKE LODGE AND RESORT *v.* UNITED STATES FOREST SERVICE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 511 F. 3d 1103.

No. 07–1267. MCLEAR *v.* WEST VIRGINIA STATE TAX COMMISSIONER. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 07–1269. ADVANTAGE MEDIA, LLC *v.* CITY OF HOPKINS, MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 511 F. 3d 833.

No. 07–1271. NOWAK *v.* TRANSPORTATION JOINT AGREEMENT OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 47 ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 85.

No. 07–1297. POLL *v.* PAULSON, SECRETARY OF THE TREASURY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 573.

No. 07–1313. CRAWFORD *v.* DEPARTMENT OF HOMELAND SECURITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 245 Fed. Appx. 369.

No. 07–1323. ALLAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 3d 712.

No. 07–8037. QUANG THANH TRAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 962 So. 2d 1237.

No. 07–8538. ANDERSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 274 Va. 469, 650 S. E. 2d 702.

No. 07–8561. ALBERT *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 229 Fed. Appx. 209.

No. 07–8752. THEER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 181 N. C. App. 349, 639 S. E. 2d 655.

No. 07–8797. PEGUERO-CRUZ *v.* MUKASEY, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 500 F. 3d 358.

No. 07–8798. MUTTART *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 116 Ohio St. 3d 5, 875 N. E. 2d 944.

No. 07–8814. DALOMBA FONTES *v.* MUKASEY, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 483 F. 3d 115.

No. 07–8819. AWAD *v.* MUKASEY, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 494 F. 3d 723.

No. 07–8942. RIGMAIDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 917.

No. 07–9037. MOORE *v.* TERRELL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 07–9069. BERNARD *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 07–9093. COLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 164 P. 3d 1089.

No. 07–9314. TYLER *v.* DANN, ATTORNEY GENERAL OF OHIO, ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 07–9355. IBARRA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 07–9372. CULVERSON *v.* DAVISON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 237 Fed. Appx. 174.

No. 07–9544. LOWERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 Fed. Appx. 839.

No. 07–9838. WARE *v.* BANK ONE. C. A. 7th Cir. Certiorari denied.

No. 07–9847. PETTIJOHN *v.* BARTOS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 248 Fed. Appx. 845.

No. 07–9851. BARZEE *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 177 P. 3d 48.

No. 07–9853. RAMIREZ *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 07–9856. LEWIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 07–9876. MYERS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–9880. SALERNO *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–9883. CONNOLLY *v.* FOK ET AL. Ct. App. Wis. Certiorari denied. Reported below: 305 Wis. 2d 656, 739 N. W. 2d 491.

No. 07–9885. SHAHID *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 07–9889. BROWN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 614.

No. 07–9890. ANDREOZZI *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 771.

No. 07–9891. MCCAIN *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 971 So. 2d 608.

No. 07–9892. PATTERSON *v.* MCCOLLUM, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–9896. WILLIAMS *v.* HAWS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 228 Fed. Appx. 705.

No. 07–9901. RANDOLPH, AKA LEWIS *v.* HELLING, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 671.

No. 07–9904. BARNES *v.* WASHINGTON MUTUAL BANK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 40 App. Div. 3d 357, 835 N. Y. S. 2d 564.

No. 07–9905. BRIGGS *v.* MOORE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 251 Fed. Appx. 77.

No. 07–9909. CORNELIUS *v.* HOWELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 246.

No. 07–9910. CLYMER *v.* COMBINE, REGIONAL DIRECTOR, PENNSYLVANIA ADULT COMMUNITY CORRECTIONS, REGION III, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–9911. COLLIER *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 689.

No. 07–9915. MEADS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 07–9921. STREET *v.* VERIZON SOUTH, INC. C. A. 4th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 618.

No. 07–9922. MANN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 07–9925. KNIGHT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 964 So. 2d 508.

No. 07–9929. PATTON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 07–9934. BJORN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 07–9941. FINLEY *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 07–9944. FALLS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9947. MONTESINO *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 973 So. 2d 455.

No. 07–9949. WASHINGTON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9952. BOSWELL *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 07–9956. MAHER *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 07–9957. MOTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–10021. GILCREAST *v.* VOORHIES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10023. GAGNE *v.* O'BRIEN, SUPERINTENDENT, NORTH CENTRAL CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied.

No. 07–10025. ROSSI *v.* NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 42 App. Div. 3d 507, 838 N. Y. S. 2d 787.

No. 07–10028. DARBY *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 747 N. W. 2d 136.

No. 07–10035. LEE *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10037. KOHER *v.* CAUDILL ET AL. Ct. App. Ky. Certiorari denied.

No. 07–10055. TICAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10079. KENDRICK *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 977 So. 2d 576.

No. 07–10103. BRYANT *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 07–10111. THAT HIN LIONG *v.* MUKASEY, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 616.

No. 07–10148. PARRA *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–10180. WOODS *v.* WILLIAMS & SONS PLUMBING & HEATING INC. ET AL. Ct. App. Mich. Certiorari denied.

No. 07–10183. HANNAN *v.* MACDONALD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10185. ANDERSEN *v.* GRIFFIN ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 07–10205. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 07–10207. DELACRUZ *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 07–10209. DAVIS *v.* KANSAS. Ct. App. Kan. Certiorari denied.

No. 07–10237. LENTWORTH *v.* POTTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 903.

No. 07–10244. GILYARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 653.

No. 07–10245. DREW *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 815.

No. 07–10265. LIGHTBOURNE *v.* MCCOLLUM, ATTORNEY GENERAL OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 969 So. 2d 326.

No. 07–10275. SCHWAB *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 969 So. 2d 318.

No. 07–10331. NEWSON *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL FACILITY. C. A. 8th Cir. Certiorari denied.

No. 07–10341. SHAW *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 243 S. W. 3d 647.

No. 07–10379. SHANDOLA *v.* CLARKE, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 968.

No. 07–10405. PENLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 07–10427. ROBERTSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 07–10428. REIGLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 943 A. 2d 561.

No. 07–10432. FRANKLIN *v.* GUNJA, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 07–10433. MCGEHEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 771.

No. 07–10434. MCRAE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 271 Fed. Appx. 358.

No. 07–10435. RUTKOSKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 3d 170.

No. 07–10440. CLOUD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 07–10444. HAWKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 3d 59.

No. 07–10448. IRVING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 306.

No. 07–10452. CROCKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 794.

No. 07–10456. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 926.

No. 07–10457. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 886.

No. 07–10459. RIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 945.

No. 07–10460. RODRIGUEZ-MEJIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 614.

No. 07–10464. EDGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 261 Fed. Appx. 379.

No. 07–10470. JOVE-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 580.

No. 07–10472. FOSTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 07–10478. BETANZOS-CENTENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 581.

No. 07–10482. ZAVALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 520 F. 3d 984.

No. 07–10484. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 204.

No. 07–10485. CHAMBERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 268 Fed. Appx. 707.

No. 07–10487. DEMJANJUK *v.* MUKASEY, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 514 F. 3d 616.

No. 07–10494. MARTINEZ-VENTURA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 240 Fed. Appx. 240.

No. 07–10496. PLACENCIA-MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 591.

No. 07–10497. MCCOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 513 F. 3d 405.

No. 07–10501. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 810.

No. 07–10502. LUGO BUENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 621.

No. 07–10505. BINTZLER *v.* RAEMISCH, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 07–10506. WASHINGTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 515 F. 3d 861.

No. 07–10508. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 532.

No. 07–10509. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10510. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 222 Fed. Appx. 202.

No. 07–10515. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 241 Fed. Appx. 935.

No. 07–10516. MOON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 3d 527.

Rehearing Denied

No. 07–1045. PATRIDGE *v.* UNITED STATES, 552 U. S. 1280;

No. 07–7432. SMITH *v.* UNITED STATES, 552 U. S. 1297;

No. 07–8499. MILLS *v.* HURLEY MEDICAL CENTER, 552 U. S. 1298;

No. 07–8555. LOLLAR *v.* DTR TENNESSEE, INC., 552 U. S. 1246;

No. 07–8598. SPUCK *v.* STOWITZKY, SUPERINTENDENT, STATE REGIONAL CORRECTIONAL FACILITY AT MERCER, ET AL., 552 U. S. 1262;

No. 07–8763. EVANS *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, 552 U. S. 1282;

No. 07–8775. QAZZA *v.* MUKASEY, ATTORNEY GENERAL, 552 U. S. 1235;

No. 07–8781. STRICKLAND *v.* GEORGIA, 552 U. S. 1266;

No. 07–8855. LANCASTER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 552 U. S. 1282;

No. 07–8957. SPUCK *v.* LYNCH, 552 U. S. 1285;

No. 07–8964. WILTZ *v.* MIDDLESEX COUNTY OFFICE OF THE PROSECUTOR ET AL., 552 U. S. 1285;

No. 07–9081. FIGUEROA *v.* WEISENFREUND ET AL., 552 U. S. 1300;

No. 07–9088. GABRILL *v.* CALIFORNIA ET AL., 552 U. S. 1300; and

No. 07–9419. TELLIER *v.* UNITED STATES, 552 U. S. 1288. Petitions for rehearing denied.

No. 07–877. WIDTFELDT *v.* TAX EQUALIZATION AND REVIEW COMMISSION ET AL., 552 U. S. 1257. Motion for leave to file petition for rehearing denied.

MAY 21, 2008

Miscellaneous Order

No. 07–11019 (07A918). IN RE BERRY. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and

by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 07–10974 (07A914). BERRY *v.* MISSISSIPPI. Sup. Ct. Miss. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 27, 2008

Certiorari Granted—Vacated and Remanded

No. 07–9390. ARREGUIN-AGUILAR *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed April 21, 2008. Reported below: 257 Fed. Appx. 152.

Certiorari Dismissed

No. 07–10194. STOLLER *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 07M69. CRAWFORD *v.* TEXAS (four judgments). Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 07–1090. REPUBLIC OF IRAQ *v.* BEATY ET AL. C. A. D. C. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 07–9065. IN RE HARRIS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [552 U. S. 1294] denied.

No. 07–10631. IN RE RIVERA; and
No. 07–10720. IN RE HAWKINS. Petitions for writs of habeas corpus denied.

No. 07–1345. IN RE BATTLE;
No. 07–9987. IN RE MCNEILL; and
No. 07–10062. IN RE ADAMS. Petitions for writs of mandamus denied.

No. 07–9976. IN RE GIBSON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 07–10049. IN RE DAVIS. Petition for writ of mandamus denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 07–10076. IN RE MITCHELL. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 07–866. SARAVIA-PAGUADA *v.* MUKASEY, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 488 F. 3d 1122.

No. 07–873. DELGADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 268.

No. 07–975. VOSE *v.* KLIMENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 3d 565.

No. 07–976. T-MOBILE USA, INC., ET AL. *v.* LASTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 777.

No. 07–977. WARNER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 3d 666.

No. 07–1012. ALFORD *v.* CUMBERLAND COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 07–1036. T-MOBILE USA, INC. *v.* GATTON ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 152 Cal. App. 4th 571, 61 Cal. Rptr. 3d 344.

No. 07–1056. ROYAL, AKA JOHNSON *v.* DURISON. C. A. 3d Cir. Certiorari denied. Reported below: 254 Fed. Appx. 163.

No. 07–1094. MORRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 3d 634.

No. 07–1096. STROMAN REALTY, INC. *v.* MARTINEZ, SECRETARY, ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION. C. A. 7th Cir. Certiorari denied. Reported below: 505 F. 3d 658.

No. 07–1102. CANAS ET UX., AS NATURAL GUARDIANS AND NEXT FRIENDS OF CANAS, ET AL. *v.* AL-JABI ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 282 Ga. 830, 653 S. E. 2d 691.

No. 07–1103. T-MOBILE USA, INC. *v.* FORD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 781.

No. 07–1111. LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC., ET AL. *v.* CITY OF LONG BRANCH, NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 3d 253.

No. 07–1197. RAYNOR *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA. C. A. 8th Cir. Certiorari denied.

No. 07–1198. SPLITTORFF *v.* AIGNER ET AL. Ct. App. Ind. Certiorari denied. Reported below: 865 N. E. 2d 1085.

No. 07–1200. NIXON *v.* CITY OF HOUSTON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 3d 494.

No. 07–1202. CLINE *v.* CLINE. C. A. 10th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 127.

No. 07–1205. BRAUNINGER *v.* MOTES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 634.

No. 07–1214. ROSENRUIST-GESTAO E SERVICOS LDA, FKA ROSENRUIST-GESTAO E SERVICOS SOCIEDADE UNIPESSOAL LDA *v.* VIRGIN ENTERPRISES LTD. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 3d 437.

No. 07–1220. OZ GAS, LTD. *v.* WARREN AREA SCHOOL DISTRICT ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 595 Pa. 128, 938 A. 2d 274.

No. 07–1222. SUNG YUEN WONG *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. (two judgments). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–1224. SHOWALTER *v.* ALBUQUERQUE TITLE CO., INC., ET AL. Ct. App. N. M. Certiorari denied.

No. 07–1228. SMITH *v.* SCHOOL BOARD OF ORANGE COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 487 F. 3d 1361.

No. 07–1233. BARRETT *v.* KOREN ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 931 A. 2d 38.

No. 07–1242. FERNANDES ET UX. *v.* SPARTA TOWNSHIP COUNCIL ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 07–1258. TOLLIS, INC., ET AL. *v.* SAN DIEGO COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 505 F. 3d 935.

No. 07–1288. CALLOWAY *v.* MONTGOMERY. C. A. 7th Cir. Certiorari denied. Reported below: 512 F. 3d 940.

No. 07–1294. MALDONADO *v.* YEINGST, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–1298. PRENDERGAST *v.* CITY OF NEW YORK, NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 44 App. Div. 3d 414, 843 N. Y. S. 2d 256.

No. 07–1339. SEWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 513 F. 3d 820.

No. 07–1340. MARRO *v.* VIRGINIA ELECTRIC & POWER CO. Sup. Ct. Va. Certiorari denied.

No. 07–1344. CREPEAU *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 224.

No. 07–1352. WEBB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 239 Fed. Appx. 400.

No. 07–6692. WATSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 234 Fed. Appx. 132.

No. 07–6955. PATRICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 Fed. Appx. 330.

No. 07–7515. FIELDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 236 Fed. Appx. 865.

No. 07–7741. DUVAL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 496 F. 3d 64.

No. 07–7904. GIBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 235 Fed. Appx. 656.

No. 07–8417. DEARINGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 522.

No. 07–8490. GILLIARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 248 Fed. Appx. 462.

No. 07–8647. MORGANFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 3d 453.

No. 07–8802. ROMERO-HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 505 F. 3d 1082.

No. 07–8937. GATLIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 925 A. 2d 594.

No. 07–8965. KUBSCH *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 866 N. E. 2d 726.

No. 07–9016. FRANKLIN *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 494 F. 3d 744.

No. 07–9153. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 3d 724.

No. 07–9460. DEBEATO *v.* MUKASEY, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 3d 231.

No. 07–9594. CHAMPNEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 909 A. 2d 868.

No. 07–9914. PERKINS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 254 Fed. Appx. 366.

No. 07–9960. HUNTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 07–9961. HUFFMAN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9964. HOWARD *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied.

No. 07–9967. FRIEND *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 935 A. 2d 10.

No. 07–9972. GOSNELL *v.* CARLTON, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 07–9973. GARCIA *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–9974. FITCH *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 07–9977. TALISON *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–9979. STEPPE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 07–9981. SECREST *v.* RYAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–9982. RITTNER *v.* MOORE ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–9986. TAYLOR *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 07–9990. WILMS *v.* FINNAN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 07–10000. BRILLHART *v.* RAGLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 396.

No. 07–10002. FOLEY *v.* SIMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 488 F. 3d 377.

No. 07–10009. LERNER *v.* LERNER ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 932 A. 2d 267.

No. 07–10015. HAMMETT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 07–10018. RAHIMI, AKA HAYATULLAH *v.* HAWS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–10019. GUINN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–10022. HARPER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 935 A. 2d 12.

No. 07–10024. SALERNO *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10026. RANKINS *v.* NORTH CAROLINA ET AL. Ct. App. N. C. Certiorari denied.

No. 07–10027. DEWESE *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 07–10033. COOKS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 957 So. 2d 1181.

No. 07–10042. ROLLE *v.* RAYSOR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 925.

No. 07–10044. WRIGHT *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 247 Fed. Appx. 701.

No. 07–10045. FORBES *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 07–10046. IMLER *v.* CENTRAL MUTUAL INSURANCE CO. ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 373 Ill. App. 3d 1173, 943 N. E. 2d 342.

No. 07–10047. NUNEZ *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 212 Ore. App. 712, 160 P. 3d 639.

No. 07–10052. FIRSTENBERGER *v.* BOARD OF BAR OVERSEERS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS ET AL.

Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 450 Mass. 1018, 878 N. E. 2d 912.

No. 07–10054. WISE *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (Reported below: 250 Fed. Appx. 546); and WISE *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. (250 Fed. Appx. 546). C. A. 4th Cir. Certiorari denied.

No. 07–10059. LAURO *v.* PATRICK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10060. MAKAS *v.* HOLANCHOCK. C. A. 2d Cir. Certiorari denied.

No. 07–10068. BIXBY *v.* JONES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–10074. MENARD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 969 So. 2d 621.

No. 07–10077. WANXIA LIAO *v.* QUIDACHAY ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10083. SIRMANS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 686.

No. 07–10086. GERA *v.* CORBETT, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 256 Fed. Appx. 563.

No. 07–10087. MOORE *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 07–10091. RICHARDS *v.* CITY OF WAUKEGAN, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 07–10092. RAMIREZ *v.* STACKS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 658.

No. 07–10094. WARE *v.* MICHIGAN DEPARTMENT OF LABOR ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–10096. CENSKE *v.* CLINTON COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–10104. BIGBY *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10105. ARCHER *v.* CRAWFORD ET AL. C. A. 8th Cir. Certiorari denied.

No. 07–10106. COLTON *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10123. CHEATHAM *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 07–10127. HERSHFELDT *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10133. RODRIGUEZ *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 968 So. 2d 1029.

No. 07–10153. ROLAND *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 908.

No. 07–10186. BRYAN *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 07–10196. HESS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 239 Fed. Appx. 86.

No. 07–10220. HARVEY *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10242. GOODLEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 07–10252. SLOAN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 07–10276. SCHNEIDER *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 07–10315. KHIANTHALAT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 974 So. 2d 359.

No. 07–10322. AGUILAR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10337. REYES *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–10344. LANE *v.* BURNS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10373. HUNTLEY *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 4.

No. 07–10378. GATTIS *v.* SOLOMON, SUPERINTENDENT, CALEDONIA CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 617.

No. 07–10400. ANDERSON *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied.

No. 07–10477. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 657.

No. 07–10489. PALACIO *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 938 A. 2d 672.

No. 07–10513. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 130.

No. 07–10514. RICHARDSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 515 F. 3d 74.

No. 07–10519. CHINNICI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 261 Fed. Appx. 347.

No. 07–10521. JASPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 07–10522. DEBREUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 725.

No. 07–10523. CAMERON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 569.

No. 07–10525. COTE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 504 F. 3d 682.

No. 07–10528. SUGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 258.

No. 07–10529. RODRIGUEZ-AGUIRRE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 07–10532. ALFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 07–10534. GARCIA-CUNANAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 563.

No. 07–10535. GORDON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 510 F. 3d 811.

No. 07–10537. RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 311 Fed. Appx. 192.

No. 07–10539. DIGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 225.

No. 07–10542. CURBELO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 Fed. Appx. 322.

No. 07–10544. GASTELUM-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 592.

No. 07–10545. FELIX-PERAZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 589.

No. 07–10546. GARDNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 232.

No. 07–10547. GALLOWAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 266.

No. 07–10549. WATKINS *v.* DRIVER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 567.

No. 07–10554. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 402.

No. 07–10556. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 512 F. 3d 995.

No. 07–10558. BREWINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 512 F. 3d 995.

No. 07–10560. MIRELES-FLORES *v.* UNITED STATES (Reported below: 265 Fed. Appx. 337); and SAENZ-RIVERA, AKA RAMIREZ RIVERA *v.* UNITED STATES (262 Fed. Appx. 590). C. A. 5th Cir. Certiorari denied.

No. 07–10561. NEWSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 3d 374.

No. 07–10564. JOOST *v.* APKER, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 07–10565. KENNEDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 717.

No. 07–10566. BOOKMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 398.

No. 07–10567. INNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 270 Fed. Appx. 899.

No. 07–10570. CARDONA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 269 Fed. Appx. 388.

No. 07–10571. ELLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10573. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 88.

No. 07–10574. SMITH *v.* SDI INDUSTRIES, INC. C. A. 10th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 93.

No. 07–10576. SALAZAR-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 506 F. 3d 748 and 252 Fed. Appx. 153.

No. 07–10577. STEIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 7.

No. 07–10580. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 379.

No. 07–10581. BARAJAS-ROMO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 530.

No. 07–10585. REID *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 317.

No. 07–10588. CLIME *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 540.

No. 07–10591. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 332.

No. 07–10593. MOYA-MENA *v.* UNITED STATES (Reported below: 262 Fed. Appx. 684); GARCIA BECERRA, AKA BECERILL GARCIA, AKA GARCIA-BECERRA, AKA GARCIA *v.* UNITED STATES (262 Fed. Appx. 685); CASTANEDA-PEREZ *v.* UNITED STATES (262 Fed. Appx. 685); ALVARADO-LOPEZ *v.* UNITED STATES (262 Fed. Appx. 652); VARGAS-VASQUEZ *v.* UNITED STATES (262 Fed. Appx. 660); GARZA-REYES, AKA ESPINOZA *v.* UNITED STATES (262 Fed. Appx. 682); CAMACHO-LOPEZ *v.* UNITED STATES (267 Fed. Appx. 373); TRUJILLO-LOYA, AKA ROJAS-GARCIA *v.* UNITED STATES (267 Fed. Appx. 399); LOPEZ-MARTINEZ *v.* UNITED STATES (268 Fed. Appx. 323); ALVARADO-RODRIGUEZ *v.* UNITED STATES (269 Fed. Appx. 427); CASTILLO-ZUNIGA, AKA CASTELLANOS-REYES *v.* UNITED STATES (270 Fed. Appx. 342); VILLAFUERTE-RODRIGUEZ, AKA RODRIGUEZ VILLAFUERTE *v.* UNITED STATES (271 Fed. Appx. 286); and PEREZ CASTRO, AKA CASTRO GUZMAN *v.* UNITED STATES (272 Fed. Appx. 385). C. A. 5th Cir. Certiorari denied.

No. 07–10594. OSBORNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 514 F. 3d 377.

No. 07–10596. TANIGUCHI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 714.

No. 07–10597. YOUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 573.

No. 07–10598. VICOL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 514 F. 3d 559.

No. 07–10601. SHERRARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 566.

No. 07–10602. RICHARDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10603. RUIZ-OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 572.

No. 07–10606. HART *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 07–10611. BUSSELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 393.

No. 07–10612. BARRERA-RENTERIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 541.

No. 07–10626. MATTHEWS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 261 Fed. Appx. 343.

No. 07–10633. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 533.

No. 07–1064. KLEINMAN, EXECUTOR OF THE ESTATE OF GERSON, DECEASED *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Motion of Estate of Louise Blyth Timken et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 507 F. 3d 435.

No. 07–10988 (07A913). GREEN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 515 F. 3d 290.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The judgment of the Court of Appeals upholding petitioner's death sentence was filed on March 11, 2008. Although the deadline for filing a petition for certiorari will not pass until next month, Virginia plans to execute petitioner this evening. This execution date requires us either to enter a stay or to give petitioner's claim less thorough consideration than we give claims routinely filed by defendants in noncapital cases. In order to ensure petitioner the same procedural safeguards available to noncapital defendants, I would grant his application for a stay of execution. See *Emmett* v. *Kelly*, 552 U. S. 942, 943 (2007) (statement respecting denial of certiorari) ("Both the interest in avoiding irreversible error in capital cases, and the interest in the efficient management of our docket, would be served by a routine practice of staying all executions scheduled in advance of the completion of our review [in the ordinary course] of the denial of

a capital defendant's first application for a federal writ of habeas corpus").

Rehearing Denied

No. 07–7086. HARRISON, AKA GREEN *v.* UNITED STATES, 552 U. S. 1050;

No. 07–7335. COMBS *v.* UNITED STATES, 552 U. S. 1260;

No. 07–8454. TAYLOR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 552 U. S. 1298;

No. 07–8976. VIRAY *v.* CALIFORNIA, 552 U. S. 1285;

No. 07–8989. CLAY *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 552 U. S. 1298;

No. 07–9017. IN RE GLAGOLA, 552 U. S. 1294;

No. 07–9167. COMRIE *v.* UNITED STATES, 552 U. S. 1269;

No. 07–9264. LOVE *v.* ROBERTS, WARDEN, ET AL., 552 U. S. 1271;

No. 07–9270. EGGERS *v.* ALABAMA, 552 U. S. 1318;

No. 07–9318. JONES *v.* NEBRASKA, 552 U. S. 1301;

No. 07–9384. CUMMINGS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL., 552 U. S. 1288; and

No. 07–9613. HIMMELREICH *v.* UNITED STATES, 552 U. S. 1304. Petitions for rehearing denied.

No. 07–8723. NEWLAND *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 552 U. S. 1248. Motion for leave to file petition for rehearing denied.

MAY 28, 2008

Dismissal Under Rule 46

No. 07–11039. CROWE *v.* DONALD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 528 F. 3d 1290.

MAY 29, 2008

Dismissal Under Rule 46

No. 07–1316. MONSANTO CO. ET AL. *v.* SYNGENTA SEEDS, INC., ET AL. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 503 F. 3d 1352.

JUNE 2, 2008

Certiorari Dismissed

No. 07–10151. ATWELL *v.* METTERAU ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 255 Fed. Appx. 655.

Miscellaneous Orders

No. 06–1595. CRAWFORD *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE. C. A. 6th Cir. [Certiorari granted, 552 U. S. 1162.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 07–542. ARIZONA *v.* GANT. Sup. Ct. Ariz. [Certiorari granted, 552 U. S. 1230.] Motions of National Association of Police Organizations, Inc., and Americans for Effective Law Enforcement et al. for leave to file briefs as *amici curiae* granted.

No. 07–610. LOCKE ET AL. *v.* KARASS, STATE CONTROLLER, ET AL. C. A. 1st Cir. [Certiorari granted, 552 U. S. 1178.] Motion of Pacific Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 07–9262. SKILLERN *v.* GARRISON, SHERIFF, CHEROKEE COUNTY, GEORGIA. Sup. Ct. Ga. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [552 U. S. 1307] denied.

No. 07–9268. XIANGYUAN ZHU *v.* FEDERAL HOUSING FINANCE BOARD ET AL. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [552 U. S. 1307] denied.

No. 07–10043. VIRAY *v.* MORA. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1002] denied.

No. 07–10781. IN RE WILSON. Petition for writ of mandamus denied.

Certiorari Denied

No. 07–1026. PERFECT 10, INC. *v.* VISA INTERNATIONAL SERVICE ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 494 F. 3d 788.

No. 07–1047. MAINSTREET ORGANIZATION OF REALTORS, FKA REALTOR ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND *v.* CALUMET CITY, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 505 F. 3d 742.

No. 07–1049. LAROSA'S INTERNATIONAL FUEL CO., INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 499 F. 3d 1324.

No. 07–1095. ORIENT MINERAL CO. ET AL. *v.* BANK OF CHINA. C. A. 10th Cir. Certiorari denied. Reported below: 506 F. 3d 980.

No. 07–1117. THOMAS *v.* TRICO PRODUCTS CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 658.

No. 07–1121. JEWELL *v.* LIFE INSURANCE COMPANY OF NORTH AMERICA. C. A. 10th Cir. Certiorari denied. Reported below: 508 F. 3d 1303.

No. 07–1153. VOTERS EDUCATION COMMITTEE ET AL. *v.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 161 Wash. 2d 470, 166 P. 3d 1174.

No. 07–1235. KONIG *v.* STATE BAR OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 900.

No. 07–1236. DIESTEL *v.* HINES, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 506 F. 3d 1249.

No. 07–1237. DRUM *v.* SUPREME COURT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 783.

No. 07–1240. CUESTA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 935 A. 2d 8.

No. 07–1244. MARTINEZ TRUJILLO *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–1245. FELLIN ET AL. *v.* HAZLE TOWNSHIP ZONING HEARING BOARD ET AL. Commw. Ct. Pa. Certiorari denied.

No. 07–1246. HANNA STEEL CORP. ET AL. *v.* LOWERY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 483 F. 3d 1184.

No. 07–1257. FRAZIER *v.* US AIRWAYS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 241 Fed. Appx. 947.

No. 07–1275. VOLKOVA *v.* MUKASEY, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 156.

No. 07–1280. MUDHOLKAR *v.* UNIVERSITY OF ROCHESTER. C. A. 2d Cir. Certiorari denied. Reported below: 261 Fed. Appx. 320.

No. 07–1301. SILVERLEAF RESORTS, INC., ET AL. *v.* MCATEER. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 3d 411.

No. 07–1325. BEMBENEK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 296 Wis. 2d 422, 724 N. W. 2d 685.

No. 07–1375. GHARBI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 3d 550.

No. 07–8578. BENN *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 161 Wash. 2d 256, 165 P. 3d 1232.

No. 07–9219. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 3d 195.

No. 07–9224. RIVERA-GONZALEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 07–9590. GALLO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 239 S. W. 3d 757.

No. 07–10112. LAPLUME *v.* MASSACHUSETTS DEPARTMENT OF SOCIAL SERVICES. App. Ct. Mass. Certiorari denied. Reported below: 69 Mass. App. 907, 870 N. E. 2d 665.

No. 07–10113. BARRETT *v.* WALDRON, TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 697.

No. 07–10114. ABULKHAIR *v.* SMITH ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 07–10116. SWAIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 07–10118. SMITH *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–10121. HOWLAND *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 3d 840.

No. 07–10122. CALDWELL *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–10124. CASILLAS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–10126. COSTA *v.* CURRY ET AL. Sup. Ct. R. I. Certiorari denied.

No. 07–10131. RIKER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 07–10134. SCOTT *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 07–10139. FREEMAN *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 247 Fed. Appx. 417.

No. 07–10140. GLASS *v.* LOCKHEED FEDERAL CREDIT UNION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 235 Fed. Appx. 655.

No. 07–10142. HERNANDEZ GONZALEZ *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–10144. FLUKER *v.* CALIFORNIA ET AL. C. A. 2d Cir. Certiorari denied.

No. 07–10145. HAYES *v.* LOS ANGELES COUNTY ALTERNATE PUBLIC DEFENDER ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10146. GORDON *v.* PERRY, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 651.

No. 07–10155. SALERNO *v.* SCHRIRO, SUPERINTENDENT, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 07–10156. PARADISE *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 07–10159. FULLER *v.* MCKEEMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 249 Fed. Appx. 987.

No. 07–10164. GREEN *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–10165. GILLIAM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–10166. FULLER *v.* STOVALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10168. HUMPHREY *v.* ONONDAGA COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 2d Cir. Certiorari denied.

No. 07–10172. GALINDO GONZALEZ *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–10173. PARKER *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 81.

No. 07–10175. MARTIN *v.* MOONEY. C. A. 8th Cir. Certiorari denied.

No. 07–10176. MARTIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–10178. WILLEMS *v.* CALIFORNIA. App. Div., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 07–10179. WINDERS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 07–10187. BRIGHT *v.* WRIGHT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 705.

No. 07–10188. BAKKE *v.* KANE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 110.

No. 07–10195. HAIRSTON *v.* LEWIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 262.

No. 07–10198. HERNANDEZ *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 07–10199. HASTON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–10201. SCOTT *v.* KELLY, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 07–10202. SHELTON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 974 So. 2d 400.

No. 07–10206. WHITE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 07–10208. CONKLIN *v.* SHERRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10216. FENNELL *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 07–10217. GORDON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 07–10218. HOFFMAN *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10221. FLOYD *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10222. FORDHAM *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 07–10223. HAMPTON *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10224. LIPSCOMB *v.* WARD ET AL. C. A. 5th Cir. Certiorari denied.

No. 07–10226. ADONAI-ADONI *v.* PRISON HEALTH SERVICES ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10227. ADONAI-ADONI *v.* KING ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10228. ADONAI-ADONI *v.* PRISON HEALTH SERVICES ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10229. BETTIS *v.* POWERS ET AL. C. A. 11th Cir. Certiorari denied.

No. 07–10249. MOZES ET AL. *v.* MUKASEY, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 237 Fed. Appx. 803.

No. 07–10261. BUSH *v.* MARTIN, SHERIFF, GALLIA COUNTY, OHIO, ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–10293. ANDERSON *v.* BRADT, ACTING SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 07–10306. COMIER *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10308. GLOSSON *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–10327. WHITE *v.* CURRY, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 470.

No. 07–10364. PAGE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 07–10382. SMITH *v.* WILSON, SUPERINTENDENT, WESTVILLE CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 503.

No. 07–10392. VAN TASSEL *v.* ROZUM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10411. JONES *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 623.

No. 07–10417. BARBER *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 07–10419. BROWN *v.* DiGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10430. WINN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 947 A. 2d 1123.

No. 07–10469. MARKLEY *v.* McBRIDE, WARDEN. Cir. Ct. Berkeley County, W. Va. Certiorari denied.

No. 07–10473. PLUMLEE *v.* CORTEZ MASTO, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 3d 1204.

No. 07–10476. MARTIN *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 376 Ill. App. 3d 853, 877 N. E. 2d 1119.

No. 07–10533. JOHNSON *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 07–10538. SLATER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 285 Conn. 162, 939 A. 2d 1105.

No. 07–10557. TURNER *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 07–10586. COLOSI *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 253 Fed. Appx. 271.

No. 07–10599. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10600. GREEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 601.

No. 07–10614. HUNTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 944 A. 2d 1114.

No. 07–10618. HOWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 261 Fed. Appx. 55.

No. 07–10624. CLARKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 259 Fed. Appx. 617.

No. 07–10630. PARRILLA *v.* KINGSTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–10639. WOOTEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 997.

No. 07–10640. WINT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 261 Fed. Appx. 340.

No. 07–10642. OWENS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 07–10648. DARBY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 232 Fed. Appx. 917.

No. 07–10650. SPRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 52.

No. 07–10656. PEPPERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 273 Fed. Appx. 155.

No. 07–10657. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 07–10658. ALSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 542.

No. 07–10660. BROWN *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 376 Ill. App. 3d 1155, 952 N. E. 2d 736.

No. 07–10661. WASHINGTON *v.* HASTINGS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10663. VARGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 255 Fed. Appx. 141.

No. 07–10669. CONNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 515.

No. 07–10671. FIELDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 07–10672. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 254 Fed. Appx. 621.

No. 07–10675. SEDILLO-GUTIERREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 659.

No. 07–10676. LYTTLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 07–10679. PARMELEE, AKA PARMALEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 262 Fed. Appx. 416.

No. 07–10686. PATEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 970.

No. 07–10691. BANKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 900.

No. 07–10692. COSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 564.

No. 07–10694. CASTRO-CATETE *v.* UNITED STATES (Reported below: 264 Fed. Appx. 361); CAZARES-CAMARILLO, AKA CAMARILLO-CAZARES, AKA CAMARILLO-COOK, AKA MENDEZ-PEREZ, AKA MENDEZ-GONZALEZ, AKA GARCIA-GOMEZ, AKA PEREZ MENDEZ *v.* UNITED STATES (263 Fed. Appx. 442); CHAVEZ-MORALES, AKA PEREA-MARTINEZ *v.* UNITED STATES (263 Fed. Appx. 439); ESCARCEGA-QUINONES *v.* UNITED STATES (263 Fed. Appx. 444); FUENTES-MEMBRENO, AKA MEMBRENO *v.* UNITED STATES (264 Fed. Appx. 362); GARCIA-BUSTOS *v.* UNITED STATES (263 Fed. Appx. 438); GARCIA-CRUZ *v.* UNITED STATES (263 Fed. Appx. 358); HOLGUIN *v.* UNITED STATES (264 Fed. Appx. 335); LEVARIO-HERMOSILLO, AKA TARANGO-NIETO *v.* UNITED STATES (264 Fed. Appx. 353); MATA-BARRERA *v.* UNITED STATES (264 Fed. Appx. 360); MEZA-BORUNDA, AKA MEZA-BARUNDA *v.* UNITED STATES (263 Fed. Appx. 443); PINA-FERNANDEZ *v.* UNITED STATES (264 Fed. Appx. 360); REYES, AKA REYES-

QUINTANILLA *v.* UNITED STATES (263 Fed. Appx. 438); RODRIGUEZ-DURAN *v.* UNITED STATES (263 Fed. Appx. 434); RODRIGUEZ-RIOS, AKA RODRIGUEZ-OROZCO, AKA RODRIGUEZ *v.* UNITED STATES (263 Fed. Appx. 436); SOLARES-GONZALEZ *v.* UNITED STATES (263 Fed. Appx. 440); TORRES-QUIROZ *v.* UNITED STATES (264 Fed. Appx. 359); VALDESPINO *v.* UNITED STATES (264 Fed. Appx. 356); and ESCARSEGA-DIAZ, AKA ESCARCEGA-DIAZ *v.* UNITED STATES (263 Fed. Appx. 435). C. A. 5th Cir. Certiorari denied.

No. 07–10696. EMBREE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 499.

No. 07–10698. SKAINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 680.

No. 07–10700. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 3d 911.

No. 07–10701. KILOUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 657.

No. 07–10702. MARSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 564.

No. 07–10703. LEWIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 274 Fed. Appx. 223.

No. 07–10704. MAGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 681.

No. 07–10705. MAGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 681.

No. 07–10710. GILYARD *v.* ACEVEDO, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–10711. GAMEZ-HERRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10712. FULLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 261 Fed. Appx. 340.

No. 07–10713. GONZALEZ-CARRILLO *v.* UNITED STATES (Reported below: 263 Fed. Appx. 437); LARA-MORALES *v.* UNITED STATES (264 Fed. Appx. 361); LARIOS-AGUIRRE *v.* UNITED STATES

(263 Fed. Appx. 433); MEDALLIN-HERRERA, AKA MEDALLIN *v.* UNITED STATES (263 Fed. Appx. 440); PENATE-PINTO *v.* UNITED STATES (263 Fed. Appx. 442); and SOTO-CASTELLANOS *v.* UNITED STATES (263 Fed. Appx. 432). C. A. 5th Cir. Certiorari denied.

No. 07–10716. ZAMORA-MAGDALENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 664.

No. 07–10717. THACKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 662.

No. 07–10724. JACKSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 375 Ill. App. 3d 1158, 945 N. E. 2d 702.

No. 07–10728. OGMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 272 Fed. Appx. 93.

No. 07–10730. CLAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 07–10731. SANCHEZ-ARRIAGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 436.

No. 07–10732. SALAS-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 356.

No. 07–10734. GUNN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 748.

No. 07–10736. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 228 Fed. Appx. 645.

No. 07–10739. HAYES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 502.

No. 07–10747. MATHISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 518 F. 3d 935.

No. 07–10748. PATTERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 266 Fed. Appx. 17.

No. 07–10749. PRICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 719.

No. 07–10751. OLIVIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 270 Fed. Appx. 950.

No. 07–10753. OSAMOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 271 Fed. Appx. 409.

No. 07–10755. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 661.

No. 07–10758. COX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 07–10763. ARREOLA-LEYVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 572.

No. 07–10780. MACKIE *v.* SABOL, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 07–10786. CURRIE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 07–10787. THOMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 263 Fed. Appx. 158.

No. 07–10788. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 237 Fed. Appx. 285.

No. 07–10794. ADDERLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 242 Fed. Appx. 18.

No. 07–10795. ARMSTRONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 682.

No. 07–10798. COOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 246 Fed. Appx. 990.

No. 07–1099. MAJOR LEAGUE BASEBALL ADVANCED MEDIA ET AL. *v.* C. B. C. DISTRIBUTION & MARKETING, INC. C. A. 8th Cir. Motion of National Football League Players Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 505 F. 3d 818.

No. 07–1238. APOTEX CORP. *v.* MERCK & CO., INC. C. A. Fed. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 507 F. 3d 1357.

Rehearing Denied

No. 07–7996. BAMBERG *v.* UNITED STATES, 552 U. S. 1261;

No. 07–8809. DICKERSON *v.* DONALD ET AL., 552 U. S. 1266;
No. 07–8947. KEHANO *v.* HAWAII ET AL., 552 U. S. 1284;
No. 07–9110. CAMPBELL *v.* TREVINO ET AL., 552 U. S. 1315;
No. 07–9448. BELTRAN *v.* NORTH CAROLINA, 552 U. S. 1301;
No. 07–9597. CARR *v.* BALLARD, WARDEN, 552 U. S. 1323; and
No. 07–9804. IN RE HERBERT, *ante*, p. 1003. Petitions for rehearing denied.

JUNE 4, 2008

Miscellaneous Order

No. 07–11232 (07A954). IN RE OSBORNE. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 07–11233 (07A956). OSBORNE *v.* GEORGIA. Super. Ct. Butts County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JUNE 9, 2008

Certiorari Granted—Vacated and Remanded

No. 06–1604. NESS *v.* UNITED STATES. C. A. 2d Cir. Reported below: 466 F. 3d 79; and
No. 07–400. MORENO-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Regalado Cuellar* v. *United States*, *ante*, p. 550.

No. 06–11863. NUNEZ-VIRRAIZABAL *v.* UNITED STATES. C. A. 11th Cir. Reported below: 484 F. 3d 1311; and
No. 07–6082. BALDERAS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 237 Fed. Appx. 921. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Regalado Cuellar* v. *United States*, *ante*, p. 550.

No. 07–834. RADIAN GUARANTY, INC. *v.* WHITFIELD ET AL. C. A. 3d Cir. Motions of Consumer Mortgage Coalition et al., Consumer Data Industry Association, and Washington Legal

Foundation et al. for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 501 F. 3d 262.

No. 07–8902. MORALES *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gall* v. *United States*, 552 U. S. 38 (2007). Reported below: 255 Fed. Appx. 287.

Miscellaneous Orders

No. 07M70. WRIGHT *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 105, Orig. KANSAS *v.* COLORADO. Exception to the Report of the Special Master is set for oral argument in due course. [For earlier order herein, see, *e. g.*, 552 U. S. 1229.]

No. 07–663. AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN ET AL. *v.* WEST, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 07–10270. SIBLEY *v.* FLORIDA BAR. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 30, 2008, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 07–10985. IN RE STAFFNEY. Petition for writ of habeas corpus denied.

No. 07–10971. IN RE COUNCE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 07–1255. IN RE FLORANCE. Petition for writ of mandamus denied.

Certiorari Granted

No. 07–1125. FITZGERALD ET VIR *v.* BARNSTABLE SCHOOL COMMITTEE ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 504 F. 3d 165.

No. 07–1216. PHILIP MORRIS USA INC. *v.* WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAMS, DECEASED. Sup. Ct. Ore. Certiorari granted limited to Question 1 presented by the petition. Reported below: 344 Ore. 45, 176 P. 3d 1255.

Certiorari Denied

No. 07–910. ANDERSON ET AL. *v.* CAGLE'S INC. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 488 F. 3d 945.

No. 07–1007. PORTLAND GENERAL ELECTRIC CO. ET AL. *v.* PUBLIC POWER COUNCIL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 3d 1009 and 1037.

No. 07–1014. TYSON FOODS, INC. *v.* DE ASENCIO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 3d 361.

No. 07–1019. GORMAN ET AL. *v.* CONSOLIDATED EDISON CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 488 F. 3d 586.

No. 07–1066. FESTO CORP. *v.* SHOKETSU KINZOKU KOGYO KABUSHIKI CO., LTD., AKA SMC CORP., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 493 F. 3d 1368.

No. 07–1107. BOARD OF TRUSTEES OF THE OHIO CARPENTERS' PENSION FUND ON BEHALF OF THE OHIO CARPENTERS' PENSION FUND ET AL. *v.* BUCCI. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 3d 635.

No. 07–1158. LIVING WATER CHURCH OF GOD *v.* CHARTER TOWNSHIP OF MERIDIAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 729.

No. 07–1252. ANGINO ET AL. *v.* MIDDLE PAXTON TOWNSHIP ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 918 A. 2d 849.

No. 07–1253. FLORANCE *v.* BUCHMEYER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 702.

No. 07–1264. YOUNG *v.* BANK ONE, N. A. C. A. 5th Cir. Certiorari denied. Reported below: 254 Fed. Appx. 335.

No. 07–1268. INMAN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 07–1272. PHILIP MORRIS USA INC. ET AL. *v.* JACKSON ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 949 So. 2d 1266.

No. 07–1296. KILGROE *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 252 Fed. Appx. 321.

No. 07–1302. CARDEN ET AL. *v.* GENERAL MOTORS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 3d 227.

No. 07–1304. PROSTAR COMPUTER, INC., ET AL. *v.* IPVENTURE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 503 F. 3d 1324.

No. 07–1319. SHANNON *v.* VIRGINIA DEPARTMENT OF JUVENILE JUSTICE. C. A. 4th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 583.

No. 07–1374. TRANQUIL PROSPECTS, LTD. *v.* HOWMEDICA OSTEONICS CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 260 Fed. Appx. 297.

No. 07–1389. UNITED STATES EX REL. HEATH *v.* DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 260 Fed. Appx. 708.

No. 07–1400. DOE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 3d 180 and 256 Fed. Appx. 379.

No. 07–9351. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 3d 931.

No. 07–9429. HURTADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 508 F. 3d 603.

No. 07–9501. CRAIG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 251 Fed. Appx. 371.

No. 07–9765. Flores Rosales *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 516 F. 3d 749.

No. 07–9887. Bennett *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 671.

No. 07–10210. Woodall *v.* California. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 07–10211. Zhenlu Zhang *v.* Science & Technology Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 241 Fed. Appx. 982.

No. 07–10212. Coleman *v.* Butler, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 901.

No. 07–10231. Curlee *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 07–10236. Miller *v.* Mendoza-Powers, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 245 Fed. Appx. 657.

No. 07–10240. Stewart *v.* Bond. C. A. 9th Cir. Certiorari denied.

No. 07–10241. Hyche *v.* Illinois Prisoner Review Board et al. C. A. 7th Cir. Certiorari denied.

No. 07–10247. Calligan *v.* Wilson, Superintendent, Westville Correctional Facility. C. A. 7th Cir. Certiorari denied.

No. 07–10248. Edwards *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 07–10253. Jones *v.* Michigan. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 07–10254. Zaidi *v.* City of Roswell, Georgia. Super. Ct. Fulton County, Ga. Certiorari denied.

No. 07–10263. Barrington *v.* Lockheed Martin et al. C. A. 11th Cir. Certiorari denied. Reported below: 257 Fed. Appx. 153.

No. 07–10264. Stuckey *v.* West Virginia. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 07–10266. JACKSON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 12.

No. 07–10268. KOHSER *v.* MERTH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 753.

No. 07–10272. WILLIAMS *v.* ARKANSAS. Ct. App. Ark. Certiorari denied.

No. 07–10273. WEAVER *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 07–10274. REESE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 230.

No. 07–10280. MURPHY *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 554.

No. 07–10284. MORALES *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 07–10285. DAVIS *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied.

No. 07–10288. DONATO *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 970 So. 2d 830.

No. 07–10290. ORTIZ *v.* BLEVINS ET AL. C. A. 5th Cir. Certiorari denied.

No. 07–10292. CHILDRESS *v.* KNOWLES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 602.

No. 07–10303. STAMBAUGH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 07–10304. WILLIAMS *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10307. COUSIN *v.* ERCOLE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 3d 334.

No. 07–10310. WILLIAMS *v.* ALMAGER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 07–10311. WILLIAMS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied.

No. 07–10312. TRAVIS *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10316. KURODA *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 07–10319. JOHNSON *v.* SECKLER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 250 Fed. Appx. 648.

No. 07–10323. MICHOWSKI *v.* MATHAI ET AL. C. A. 6th Cir. Certiorari denied.

No. 07–10324. BARDWELL *v.* BARDWELL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 373 Ill. App. 3d 1137, 943 N. E. 2d 326.

No. 07–10351. ROBINSON *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 07–10377. FLORES *v.* PEAKE, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 476 F. 3d 1379.

No. 07–10385. JACK *v.* ROBERTS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 256 Fed. Appx. 314.

No. 07–10437. REYNOLDS *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 498 F. 3d 549.

No. 07–10442. EJEDAWE *v.* MUKASEY, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 234 Fed. Appx. 594.

No. 07–10453. CARRION *v.* WILSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 262 Fed. Appx. 693.

No. 07–10465. DAVIS *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 07–10466. COHENS *v.* LUNDQUIST, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–10471. PETTIES *v.* NEW YORK CITY HOUSING AUTHORITY. Ct. App. N. Y. Certiorari denied. Reported below: 10 N. Y. 3d 799, 886 N. E. 2d 793.

No. 07–10495. NICHOLS *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 07–10518. PELLETIER *v.* WATSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 269 Fed. Appx. 272.

No. 07–10575. TAVAREZ *v.* MARSHALL, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 07–10617. MILLS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 976 So. 2d 1110.

No. 07–10636. BUNDY *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS. Commw. Ct. Pa. Certiorari denied. Reported below: 924 A. 2d 723.

No. 07–10655. NEWSOME *v.* WEST VIRGINIA. Cir. Ct. Cabell County, W. Va. Certiorari denied.

No. 07–10680. MITCHELL *v.* WATKINS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 252 Fed. Appx. 874.

No. 07–10683. CALLAHAN *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 515 F. 3d 1168.

No. 07–10693. CRAWFORD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 375 Ill. App. 3d 1138, 945 N. E. 2d 695.

No. 07–10697. SLEEPER *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 510 F. 3d 32.

No. 07–10750. MCCULLOUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 303.

No. 07–10783. SCHLS *v.* WASHTENAW COMMUNITY HEALTH ORGANIZATION. Ct. App. Mich. Certiorari denied.

No. 07–10785. RAMSEY *v.* STANSBERRY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 258 Fed. Appx. 607.

No. 07–10791. ELLIS *v.* EMERY, TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 315 Fed. Appx. 5.

No. 07–10796. ARGENTINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 267 Fed. Appx. 31.

No. 07–10799. BRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 241 Fed. Appx. 984.

No. 07–10801. LOPEZ-DELEON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 3d 472.

No. 07–10803. PENA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 574.

No. 07–10804. KHONG NGUYEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 523 F. 3d 43.

No. 07–10806. TRULY *v.* JONES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 07–10807. GLAUDE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 248 Fed. Appx. 175.

No. 07–10812. BAZAN GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 161.

No. 07–10813. GRASS, AKA GRASSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 238 Fed. Appx. 826.

No. 07–10817. GADD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 234 Fed. Appx. 122.

No. 07–10819. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 757.

No. 07–10822. FIGUEROA-LOZADA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10823. PLIEGO-DUARTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 861.

No. 07–10826. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 512 F. 3d 1040.

No. 07–10827. DIAZ RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 454.

No. 07–10829. SAMUELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10832. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 3d 364.

No. 07–10833. BANKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 514 F. 3d 769.

No. 07–10838. GAUGHAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 07–10839. IRVIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 230 Fed. Appx. 951.

No. 07–10841. WILLIAMS *v.* UNITED STATES; and
No. 07–10866. CLAVO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 245.

No. 07–10842. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 795.

No. 07–10844. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10851. RHODES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 382.

No. 07–10855. JIMENEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 512 F. 3d 1.

No. 07–10856. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 07–10861. HOPKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 07–10862. HUYNH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 715.

No. 07–10864. CASTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 253.

No. 07–10865. DORSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 267 Fed. Appx. 652.

No. 07–10868. DANIELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 219.

No. 07–10872. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 515 F. 3d 845.

No. 07–10875. NIBLOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 254 Fed. Appx. 986.

No. 07–10879. ANTHONY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 257 Fed. Appx. 597.

No. 07–10880. BROWN *v.* WILLIAMS ET AL. C. A. 8th Cir. Certiorari denied.

No. 07–10882. CUNNINGHAM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 07–10886. EVANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 07–10889. TERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 276 Fed. Appx. 303.

No. 07–10890. WINSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 391.

No. 07–10892. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 264 Fed. Appx. 328.

No. 07–10897. QAZI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 196.

No. 07–10900. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 07–10902. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 07–10907. DICKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 264 Fed. Appx. 252.

No. 07–10909. CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 3d 682.

No. 07–10912. PEARCE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 263 Fed. Appx. 507.

No. 07–10913. NUNEZ-VILLEGAS, AKA NUNEZ VILLEGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 266 Fed. Appx. 629.

No. 07–10914. MCCREARY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 308 Fed. Appx. 39.

No. 07–10918. BRIONES-ZAPATA *v.* UNITED STATES (Reported below: 265 Fed. Appx. 311); RECINOS-DUARTE *v.* UNITED STATES (265 Fed. Appx. 388); FLORES-CORTEZ *v.* UNITED STATES (269 Fed. Appx. 325); VARGAS-GARCIA *v.* UNITED STATES (269 Fed. Appx. 531); and TORRES-MALDONADO *v.* UNITED STATES (267 Fed. Appx. 336). C. A. 5th Cir. Certiorari denied.

No. 07–10919. ASHLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 919 A. 2d 1172.

No. 07–10921. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 265 Fed. Appx. 314.

No. 07–10926. RAMOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 264 Fed. Appx. 57.

No. 07–10929. CURRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 507 F. 3d 603.

No. 06–1398. AT&T PENSION BENEFIT PLAN, AS SUCCESSOR TO THE AMERITECH MANAGEMENT PENSION PLAN *v.* CALL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 7th Cir. Motion of American Benefits Council et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 475 F. 3d 816.

No. 07–1263. SAINT-GOBAIN CALMAR, INC., NKA MEADWESTVACO CALMAR, INC. *v.* ARMINAK & ASSOCIATES, INC., ET AL. C. A. Fed. Cir. Motion of Industrial Designers Society of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 501 F. 3d 1314.

No. 07–1373. GLENMONT HILLS ASSOCIATES PRIVACY WORLD AT GLENMONT METRO CENTRE *v.* MONTGOMERY COUNTY, MARYLAND. Ct. App. Md. Motions of National Association of Home Builders, California Apartment Association, and National Association of Residential Property Managers for leave to file briefs as

amici curiae granted. Certiorari denied. Reported below: 402 Md. 250, 936 A. 2d 325.

Rehearing Denied

No. 07–905. DYNO *v.* VILLAGE OF JOHNSON CITY, NEW YORK, 552 U. S. 1310;

No. 07–1011. TINKHAM ET AL. *v.* KELLY ET AL., 552 U. S. 1311;

No. 07–6234. COOEY *v.* STRICKLAND, GOVERNOR OF OHIO, ET AL., *ante*, p. 1014;

No. 07–7707. BEASON *v.* UNITED STATES, *ante*, p. 1006;

No. 07–8791. SMITH *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 552 U. S. 1282;

No. 07–8910. BENSON *v.* POTTER, POSTMASTER GENERAL, ET AL., 552 U. S. 1283;

No. 07–8927. O'DONNELL *v.* GUNDY, WARDEN, 552 U. S. 1284;

No. 07–9006. BRALEY *v.* CALIFORNIA ET AL., 552 U. S. 1298;

No. 07–9056. MINNFEE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 552 U. S. 1299;

No. 07–9096. CROWE *v.* HALL, WARDEN, *ante*, p. 1007;

No. 07–9109. DE JESUS ESTACIO *v.* OREGON JUDICIAL DEPARTMENT ET AL., 552 U. S. 1315;

No. 07–9236. BALZAROTTI *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 552 U. S. 1318;

No. 07–9238. CARLSON *v.* AMERICAN EXPRESS FINANCIAL ADVISORS ET AL., 552 U. S. 1318;

No. 07–9252. REYES *v.* TOVAR, 552 U. S. 1287;

No. 07–9269. ZOCHLINSKI *v.* UNIVERSITY OF CALIFORNIA ET AL., 552 U. S. 1318;

No. 07–9280. KENON *v.* FLORIDA, 552 U. S. 1301;

No. 07–9307. SANDERS *v.* UNITED STATES, 552 U. S. 1301;

No. 07–9539. GERMAN *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 1009;

No. 07–9577. HEFLEY *v.* VILLAGE OF CALUMET PARK, ILLINOIS, ET AL., 552 U. S. 1323;

No. 07–9604. MATHIS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, 552 U. S. 1303;

No. 07–9696. NNAJI *v.* UNITED STATES, 552 U. S. 1324;

No. 07–9710. TETREAULT ET VIR *v.* HOUGHTON ET AL.; and TETREAULT ET VIR *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, 552 U. S. 1325;

No. 07–10171. HEDGEPETH *v.* UNITED STATES, *ante*, p. 1026; and

No. 07–10283. IN RE NEALON, *ante*, p. 1017. Petitions for rehearing denied.

JUNE 11, 2008

Miscellaneous Order

No. 07–11302 (07A970). IN RE CHAMBERLAIN. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 07–11301 (07A969). CHAMBERLAIN *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 23, 2008, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1106. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, and 550 U. S. 989.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 2008

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 2008

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024, and new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011.

[See *infra*, pp. 1109–1147.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2008, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1005. Caption of petition.

The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the following information about the debtor: name, employer identification number, last four digits of the social-security number or individual debtor's taxpayer-identification number, any other federal taxpayer-identification number, and all other names used within eight years before filing the petition. If the petition is not filed by the debtor, it shall include all names used by the debtor which are known to the petitioners.

Rule 1006. Filing fee.

(*a*) *General requirement.*—Every petition shall be accompanied by the filing fee except as provided in subdivisions (b) and (c) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U. S. C. § 1930(a)(1)–(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U. S. C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

(*b*) *Payment of filing fee in installments.*

(*1*) *Application to pay filing fee in installments.*—A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application, prepared as prescribed by the appropriate Official Form, stating that the debtor is unable to pay the filing fee except in installments.

. . . . .

(3) *Postponement of attorney's fees.*—All installments of the filing fee must be paid in full before the debtor or chapter 13 trustee may make further payments to an attorney or any other person who renders services to the debtor in connection with the case.

(c) *Waiver of filing fee.*—A voluntary chapter 7 petition filed by an individual shall be accepted for filing if accompanied by the debtor's application requesting a waiver under 28 U. S. C. § 1930(f), prepared as prescribed by the appropriate Official Form.

Rule 1007. Lists, schedules, statements, and other documents; time limits.

(a) *Corporate ownership statement, list of creditors and equity security holders, and other lists.*

. . . . . .

(4) *Chapter 15 case.*—In addition to the documents required under § 1515 of the Code, a foreign representative filing a petition for recognition under chapter 15 shall file with the petition: (A) a corporate ownership statement containing the information described in Rule 7007.1; and (B) unless the court orders otherwise, a list containing the names and addresses of all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and all entities against whom provisional relief is being sought under § 1519 of the Code.

(5) *Extension of time.*—Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to the United States trustee and to any trustee, committee elected under § 705 or appointed under § 1102 of the Code, or other party as the court may direct.

(b) *Schedules, statements, and other documents required.*

(1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed by the appropriate Official Forms, if any:

(A) schedules of assets and liabilities;

(B) a schedule of current income and expenditures;

(C) a schedule of executory contracts and unexpired leases;

(D) a statement of financial affairs;

(E) copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition, with redaction of all but the last four digits of the debtor's social-security number or individual taxpayer-identification number; and

(F) a record of any interest that the debtor has in an account or program of the type specified in § 521(c) of the Code.

(2) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(a) of the Code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.

(3) Unless the United States trustee has determined that the credit counseling requirement of § 109(h) does not apply in the district, an individual debtor must file a statement of compliance with the credit counseling requirement, prepared as prescribed by the appropriate Official Form which must include one of the following:

(A) an attached certificate and debt repayment plan, if any, required by § 521(b);

(B) a statement that the debtor has received the credit counseling briefing required by § 109(h)(1) but does not have the certificate required by § 521(b);

(C) a certification under § 109(h)(3); or

(D) a request for a determination by the court under § 109(h)(4).

(4) Unless § 707(b)(2)(D) applies, an individual debtor in a chapter 7 case shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the me-

dian family income for the applicable state and household size, the information, including calculations, required by § 707(b), prepared as prescribed by the appropriate Official Form.

(5) An individual debtor in a chapter 11 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form.

(6) A debtor in a chapter 13 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, a calculation of disposable income made in accordance with § 1325(b)(3), prepared as prescribed by the appropriate Official Form.

(7) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form. An individual debtor shall file the statement in a chapter 11 case in which § 1141(d)(3) applies.

(8) If an individual debtor in a chapter 11, 12, or 13 case has claimed an exemption under § 522(b)(3)(A) in property of the kind described in § 522(p)(1) with a value in excess of the amount set out in § 522(q)(1), the debtor shall file a statement as to whether there is any proceeding pending in which the debtor may be found guilty of a felony of a kind described in § 522(q)(1)(A) or found liable for a debt of the kind described in § 522(q)(1)(B).

(c) *Time limits.*—In a voluntary case, the schedules, statements, and other documents required by subdivisions (b)(1), (4), (5), and (6) shall be filed with the petition or within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 15 days of the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed

with the petition. Unless the court orders otherwise, a debtor who has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 15 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 45 days after the first date set for the meeting of creditors under §341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under §1141(d)(5)(B) or §1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in §1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under §705 or appointed under §1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

. . . . .

Rule 1009. Amendments of voluntary petitions, lists, schedules and statements.

. . . . .

(*b*) *Statement of intention.*—The statement of intention may be amended by the debtor at any time before the expiration of the period provided in §521(a) of the Code. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby.

. . . . .

Rule 1010. Service of involuntary petition and summons; petition for recognition of a foreign nonmain proceeding.

(*a*) *Service of involuntary petition and summons; service of petition for recognition of foreign nonmain proceeding.*—On the filing of an involuntary petition or a petition for recognition of a foreign nonmain proceeding, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other party as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(*l*) F. R. Civ. P. apply when service is made or attempted under this rule.

(*b*) *Corporate ownership statement.*—Each petitioner that is a corporation shall file with the involuntary petition a corporate ownership statement containing the information described in Rule 7007.1.

Rule 1011. Responsive pleading or motion in involuntary and cross-border cases.

(*a*) *Who may contest petition.*—The debtor named in an involuntary petition, or a party in interest to a petition for recognition of a foreign proceeding, may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

. . . . .

(*f*) *Corporate ownership statement.*—If the entity responding to the involuntary petition or the petition for recognition of a foreign proceeding is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

Rule 1015. Consolidation or joint administration of cases pending in same court.

. . . . .

(*b*) *Cases involving two or more related debtors.*—If a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of a husband and wife shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).

. . . . .

Rule 1017. Dismissal or conversion of case; suspension.

. . . . .

(*e*) *Dismissal of an individual debtor's Chapter 7 case, or conversion to a case under Chapter 11 or 13, for abuse.*—The court may dismiss or, with the debtor's consent, convert an individual debtor's case for abuse under § 707(b) only on motion and after a hearing on notice to the debtor, the

trustee, the United States trustee, and any other entity as the court directs.

(1) Except as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss. The party filing the motion shall set forth in the motion all matters to be considered at the hearing. In addition, a motion to dismiss under § 707(b)(1) and (3) shall state with particularity the circumstances alleged to constitute abuse.

. . . . .

Rule 1019. Conversion of a Chapter 11 reorganization case, Chapter 12 family farmer's debt adjustment case, or Chapter 13 individual's debt adjustment case to a Chapter 7 liquidation case.

. . . . .

(2) *New filing periods.*—A new time period for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence under Rules 1017, 3002, 4004, or 4007, but a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

. . . . .

Rule 1020. Small business Chapter 11 reorganization case.

(a) *Small business debtor designation.*—In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 15 days after entry of the order for relief a statement as to whether

the debtor is a small business debtor. Except as provided in subdivision (c), the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.

(*b*) *Objecting to designation.*—Except as provided in subdivision (c), the United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under §341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.

(*c*) *Appointment of committee of unsecured creditors.*—If a committee of unsecured creditors has been appointed under §1102(a)(1), the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business. A request for a determination under this subdivision may be filed by the United States trustee or a party in interest only within a reasonable time after the failure of the committee to be sufficiently active and representative. The debtor may file a request for a determination at any time as to whether the committee has been sufficiently active and representative.

(*d*) *Procedure for objection or determination.*—Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; any committee appointed under §1102 or its authorized agent, or, if no committee of unsecured creditors has been appointed under §1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs.

Rule 1021. Health care business case.

(*a*) *Health care business designation.*—Unless the court orders otherwise, if a petition in a case under chapter 7,

chapter 9, or chapter 11 states that the debtor is a health care business, the case shall proceed as a case in which the debtor is a health care business.

(*b*) *Motion.*—The United States trustee or a party in interest may file a motion to determine whether the debtor is a health care business. The motion shall be transmitted to the United States trustee and served on: the debtor; the trustee; any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs. The motion shall be governed by Rule 9014.

Rule 2002. Notices to creditors, equity security holders, administrators in foreign proceedings, persons against whom provisional relief is sought in ancillary and other cross-border cases, United States, and United States trustee.

(*a*) *Twenty-day notices to parties in interest.*—Except as provided in subdivisions (h), (i), (*l*), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

. . . . .

(*b*) *Twenty-five-day notices to parties in interest.*—Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement or, under § 1125(f), to make a final determination whether the plan provides adequate information so that a separate disclosure statement is not necessary; and (2) for filing objections and the hearing to consider confirmation of a chapter 9, chapter 11, or chapter 13 plan.

(c) *Content of notice.*

(1) *Proposed use, sale, or lease of property.*—Subject to Rule 6004, the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property. The notice of a proposed sale or lease of personally identifiable information under §363(b)(1) of the Code shall state whether the sale is consistent with any policy prohibiting the transfer of the information.

. . . . .

(f) *Other notices.*—Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

(1) the order for relief;

(2) the dismissal or the conversion of the case to another chapter, or the suspension of proceedings under §305;

(3) the time allowed for filing claims pursuant to Rule 3002;

(4) the time fixed for filing a complaint objecting to the debtor's discharge pursuant to §727 of the Code as provided in Rule 4004;

(5) the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to §523 of the Code as provided in Rule 4007;

(6) the waiver, denial, or revocation of a discharge as provided in Rule 4006;

(7) entry of an order confirming a chapter 9, 11, or 12 plan;

(8) a summary of the trustee's final report in a chapter 7 case if the net proceeds realized exceed $1,500;

(9) a notice under Rule 5008 regarding the presumption of abuse;

(10) a statement under § 704(b)(1) as to whether the debtor's case would be presumed to be an abuse under § 707(b); and

(11) the time to request a delay in the entry of the discharge under §§ 1141(d)(5)(C), 1228(f), and 1328(h). Notice of the time fixed for accepting or rejecting a plan pursuant to Rule 3017(c) shall be given in accordance with Rule 3017(d).

(*g*) *Addressing notices.*

. . . . .

(2) Except as provided in § 342(f) of the Code, if a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be mailed to the address shown on the list of equity security holders.

. . . . .

(5) A creditor may treat a notice as not having been brought to the creditor's attention under § 342(g)(1) only if, prior to issuance of the notice, the creditor has filed a statement that designates the name and address of the person or organizational subdivision of the creditor responsible for receiving notices under the Code, and that describes the procedures established by the creditor to cause such notices to be delivered to the designated person or subdivision.

. . . . .

(*k*) *Notices to United States trustee.*—Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to

the United States trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules requires the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U. S. C. § 78aaa *et seq.*

. . . . .

(*p*) *Notice to a creditor with a foreign address.*

(1) If, at the request of the United States trustee or a party in interest, or on its own initiative, the court finds that a notice mailed within the time prescribed by these rules would not be sufficient to give a creditor with a foreign address to which notices under these rules are mailed reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be enlarged.

(2) Unless the court for cause orders otherwise, a creditor with a foreign address to which notices under this rule are mailed shall be given at least 30 days' notice of the time fixed for filing a proof of claim under Rule 3002(c) or Rule 3003(c).

(3) Unless the court for cause orders otherwise, the mailing address of a creditor with a foreign address shall be determined under Rule 2002(g).

(*q*) *Notice of petition for recognition of foreign proceeding and of court's intention to communicate with foreign courts and foreign representatives.*

(*1*) *Notice of petition for recognition.*—The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of

the petition, and such other entities as the court may direct, at least 20 days' notice by mail of the hearing on the petition for recognition of a foreign proceeding. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding.

(2) *Notice of court's intention to communicate with foreign courts and foreign representatives.*—The clerk, or some other person as the court may direct, shall give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, notice by mail of the court's intention to communicate with a foreign court or foreign representative.

Rule 2003. Meeting of creditors or equity security holders.

(a) *Date and place.*—Except as otherwise provided in § 341(e) of the Code, in a chapter 7 liquidation or a chapter 11 reorganization case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 40 days after the order for relief. In a chapter 12 family farmer's debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 35 days after the order for relief. In a chapter 13 individual's debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 50 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later date for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the

meeting may be held not more than 60 days after the order for relief.

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Rule 2007.1. Appointment of trustee or examiner in a Chapter 11 reorganization case.

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(*b*) *Election of trustee.*

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(*3*) *Report of election and resolution of disputes.*

(*A*) *Report of undisputed election.*—If no dispute arises out of the election, the United States trustee shall promptly file a report certifying the election, including the name and address of the person elected and a statement that the election is undisputed. The report shall be accompanied by a verified statement of the person elected setting forth that person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(*B*) *Dispute arising out of an election.*—If a dispute arises out of an election, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute, setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. Not later than the date on which the report of the disputed election is filed, the United States trustee shall mail a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b)

or to receive a copy of the report, and to any committee appointed under § 1102 of the Code.

(c) *Approval of appointment.*—An order approving the appointment of a trustee or an examiner under § 1104(d) of the Code shall be made on application of the United States trustee. The application shall state the name of the person appointed and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, or persons employed in the office of the United States trustee. The application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Rule 2007.2. Appointment of patient care ombudsman in a health care business case.

(a) *Order to appoint patient care ombudsman.*—In a chapter 7, chapter 9, or chapter 11 case in which the debtor is a health care business, the court shall order the appointment of a patient care ombudsman under § 333 of the Code, unless the court, on motion of the United States trustee or a party in interest filed no later than 20 days after the commencement of the case or within another time fixed by the court, finds that the appointment of a patient care ombudsman is not necessary under the specific circumstances of the case for the protection of patients.

(b) *Motion for order to appoint ombudsman.*—If the court has found that the appointment of an ombudsman is not necessary, or has terminated the appointment, the court, on motion of the United States trustee or a party in interest, may order the appointment at a later time if it finds that the appointment has become necessary to protect patients.

(c) *Notice of appointment.*—If a patient care ombudsman is appointed under §333, the United States trustee shall promptly file a notice of the appointment, including the name and address of the person appointed. Unless the person appointed is a State Long-Term Care Ombudsman, the notice shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, patients, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

(d) *Termination of appointment.*—On motion of the United States trustee or a party in interest, the court may terminate the appointment of a patient care ombudsman if the court finds that the appointment is not necessary to protect patients.

(e) *Motion.*—A motion under this rule shall be governed by Rule 9014. The motion shall be transmitted to the United States trustee and served on: the debtor; the trustee; any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and such other entities as the court may direct.

Rule 2015. Duty to keep records, make reports, and give notice of case or change of status.

(a) *Trustee or debtor in possession.*—A trustee or debtor in possession shall:

(1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case file and transmit to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed;

(2) keep a record of receipts and the disposition of money and property received;

(3) file the reports and summaries required by § 704(8) of the Code which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited;

(4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case;

(5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter during which there is a duty to pay fees under 28 U. S. C. § 1930(a)(6), file and transmit to the United States trustee a statement of any disbursements made during that quarter and of any fees payable under 28 U. S. C. § 1930(a)(6) for that quarter; and

(6) in a chapter 11 small business case, unless the court, for cause, sets another reporting interval, file and transmit to the United States trustee for each calendar month after the order for relief, on the appropriate Official Form, the report required by § 308. If the order for relief is within the first 15 days of a calendar month, a report shall be filed for the portion of the month that follows the order for relief. If the order for relief is after the 15th day of a calendar month, the period for the remainder of the month shall be included in the report for the next calendar month. Each report shall be filed no later than 20 days after the last day of the calendar month following the month covered by the report. The obligation to file reports under this subparagraph terminates on the effective date of the plan, or conversion or dismissal of the case.

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(*d*) *Foreign representative.*—In a case in which the court has granted recognition of a foreign proceeding under chapter 15, the foreign representative shall file any notice required under § 1518 of the Code within 15 days after the date when the representative becomes aware of the subsequent information.

(*e*) *Transmission of reports.*—In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be mailed to the creditors, equity security holders, and indenture trustees. The court may also direct the publication of summaries of any such reports. A copy of every report or summary mailed or published pursuant to this subdivision shall be transmitted to the United States trustee.

Rule 2015.1. Patient care ombudsman.

(*a*) *Reports.*—A patient care ombudsman, at least 10 days before making a report under § 333(b)(2) of the Code, shall give notice that the report will be made to the court, unless the court orders otherwise. The notice shall be transmitted to the United States trustee, posted conspicuously at the health care facility that is the subject of the report, and served on: the debtor; the trustee; all patients; and any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and such other entities as the court may direct. The notice shall state the date and time when the report will be made, the manner in which the report will be made, and, if the report is in writing, the name, address, telephone number, email address, and website, if any, of the person from whom a copy of the report may be obtained at the debtor's expense.

(*b*) *Authorization to review confidential patient records.*—A motion by a patient care ombudsman under § 333(c) to review confidential patient records shall be governed by Rule 9014, served on the patient and any family member or other

contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, and transmitted to the United States trustee subject to applicable nonbankruptcy law relating to patient privacy. Unless the court orders otherwise, a hearing on the motion may not be commenced earlier than 15 days after service of the motion.

Rule 2015.2. Transfer of patient in health care business case.

Unless the court orders otherwise, if the debtor is a health care business, the trustee may not transfer a patient to another health care business under § 704(a)(12) of the Code unless the trustee gives at least 10 days' notice of the transfer to the patient care ombudsman, if any, the patient, and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care. The notice is subject to applicable nonbankruptcy law relating to patient privacy.

Rule 2015.3. Reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest.

(*a*) *Reporting requirement.*—In a chapter 11 case, the trustee or debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the appropriate Official Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession.

(*b*) *Time for filing; service.*—The first report required by this rule shall be filed no later than five days before the first date set for the meeting of creditors under § 341 of the Code. Subsequent reports shall be filed no less frequently than every six months thereafter, until the effective date of a plan

or the case is dismissed or converted. Copies of the report shall be served on the United States trustee, any committee appointed under § 1102 of the Code, and any other party in interest that has filed a request therefor.

(c) *Presumption of substantial or controlling interest; judicial determination.*—For purposes of this rule, an entity of which the estate controls or owns at least a 20 percent interest, shall be presumed to be an entity in which the estate has a substantial or controlling interest. An entity in which the estate controls or owns less than a 20 percent interest shall be presumed not to be an entity in which the estate has a substantial or controlling interest. Upon motion, the entity, any holder of an interest therein, the United States trustee, or any other party in interest may seek to rebut either presumption, and the court shall, after notice and a hearing, determine whether the estate's interest in the entity is substantial or controlling.

(d) *Modification of reporting requirement.*—The court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information required by subdivision (a) is publicly available.

(e) *Notice and protective orders.*—No later than 14 days before filing the first report required by this rule, the trustee or debtor in possession shall send notice to the entity in which the estate has a substantial or controlling interest, and to all holders—known to the trustee or debtor in possession—of an interest in that entity, that the trustee or debtor in possession expects to file and serve financial information relating to the entity in accordance with this rule. The entity in which the estate has a substantial or controlling interest, or a person holding an interest in that entity, may request protection of the information under § 107 of the Code.

(f) *Effect of request.*—Unless the court orders otherwise, the pendency of a request under subdivisions (c), (d), or (e)

of this rule shall not alter or stay the requirements of subdivision (a).

Rule 3002. Filing proof of claim or interest.

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(c) *Time for filing.*—In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under § 1308, is timely filed if it is filed not later than 180 days after the date of the order for relief. A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under § 1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return. The court may, for cause, enlarge the time for a governmental unit to file a proof of claim only upon motion of the governmental unit made before expiration of the period for filing a timely proof of claim.

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(5) If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed.

(6) If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.

Rule 3003. Filing proof of claim or equity security interest in Chapter 9 municipality or Chapter 11 reorganization cases.

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(c) *Filing proof of claim.*

(1) *Who may file.*—Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) *Who must file.*—Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) *Time for filing.*—The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).

(4) *Effect of filing claim or interest.*—A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(a)(1) of the Code.

(5) *Filing by indenture trustee.*—An indenture trustee may file a claim on behalf of all known or unknown holders of securities issued pursuant to the trust instrument under which it is trustee.

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Rule 3016. Filing of plan and disclosure statement in a Chapter 9 municipality or Chapter 11 reorganization case.

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(b) *Disclosure statement.*—In a chapter 9 or 11 case, a disclosure statement under § 1125 of the Code or evidence show-

ing compliance with § 1126(b) shall be filed with the plan or within a time fixed by the court, unless the plan is intended to provide adequate information under § 1125(f)(1). If the plan is intended to provide adequate information under § 1125(f)(1), it shall be so designated and Rule 3017.1 shall apply as if the plan is a disclosure statement.

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(*d*) *Standard form small business disclosure statement and plan.*—In a small business case, the court may approve a disclosure statement and may confirm a plan that conform substantially to the appropriate Official Forms or other standard forms approved by the court.

Rule 3017.1. Court consideration of disclosure statement in a small business case.

(*a*) *Conditional approval of disclosure statement.*—In a small business case, the court may, on application of the plan proponent or on its own initiative, conditionally approve a disclosure statement filed in accordance with Rule 3016. On or before conditional approval of the disclosure statement, the court shall:

(1) fix a time within which the holders of claims and interests may accept or reject the plan;

(2) fix a time for filing objections to the disclosure statement;

(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(4) fix a date for the hearing on confirmation.

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Rule 3019. Modification of accepted plan in a Chapter 9 municipality or a Chapter 11 reorganization case.

(*a*) *Modification of plan before confirmation.*—In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modi-

fication does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

(*b*) *Modification of plan after confirmation in individual debtor case.*—If the debtor is an individual, a request to modify the plan under § 1127(e) of the Code is governed by Rule 9014. The request shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days' notice by mail of the time fixed to file objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee, together with a copy of the proposed modification. Any objection to the proposed modification shall be filed and served on the debtor, the proponent of the modification, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee.

Rule 4002. Duties of debtor.

(*a*) *In general.*—In addition to performing other duties prescribed by the Code and rules, the debtor shall:

(1) attend and submit to an examination at the times ordered by the court;

(2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness;

(3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007;

(4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and

(5) file a statement of any change of the debtor's address.

(*b*) *Individual debtor's duty to provide documentation.*

(*1*) *Personal identification.*—Every individual debtor shall bring to the meeting of creditors under §341:

(A) a picture identification issued by a governmental unit, or other personal identifying information that establishes the debtor's identity; and

(B) evidence of social-security number(s), or a written statement that such documentation does not exist.

(*2*) *Financial information.*—Every individual debtor shall bring to the meeting of creditors under §341, and make available to the trustee, the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor's possession:

(A) evidence of current income such as the most recent payment advice;

(B) unless the trustee or the United States trustee instructs otherwise, statements for each of the debtor's depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition; and

(C) documentation of monthly expenses claimed by the debtor if required by § 707(b)(2)(A) or (B).

(*3*) *Tax return.*—At least 7 days before the first date set for the meeting of creditors under §341, the debtor shall provide to the trustee a copy of the debtor's federal income tax return for the most recent tax year ending immediately before the commencement of the case and for which a return was filed, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.

(*4*) *Tax returns provided to creditors.*—If a creditor, at least 15 days before the first date set for the meeting of creditors under §341, requests a copy of the debtor's tax

return that is to be provided to the trustee under subdivision (b)(3), the debtor, at least 7 days before the first date set for the meeting of creditors under §341, shall provide to the requesting creditor a copy of the return, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.

(5) *Confidentiality of tax information.*—The debtor's obligation to provide tax returns under Rule 4002(b)(3) and (b)(4) is subject to procedures for safeguarding the confidentiality of tax information established by the Director of the Administrative Office of the United States Courts.

Rule 4003. Exemptions.

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(*b*) *Objecting to a claim of exemptions.*

(1) Except as provided in paragraphs (2) and (3), a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under §341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

(2) The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption. The trustee shall deliver or mail the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney.

(3) An objection to a claim of exemption based on §522(q) shall be filed before the closing of the case. If an exemption is first claimed after a case is reopened, an objection shall be filed before the reopened case is closed.

(4) A copy of any objection shall be delivered or mailed to the trustee, the debtor and the debtor's attorney, and the person filing the list and that person's attorney.

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(d) *Avoidance by debtor of transfers of exempt property.*—A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014. Notwithstanding the provisions of subdivision (b), a creditor may object to a motion filed under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.

Rule 4004. Grant or denial of discharge.

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(c) *Grant of discharge.*

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

(A) the debtor is not an individual;

(B) a complaint objecting to the discharge has been filed;

(C) the debtor has filed a waiver under § 727(a)(10);

(D) a motion to dismiss the case under § 707 is pending;

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;

(G) the debtor has not paid in full the filing fee prescribed by 28 U. S. C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U. S. C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U. S. C. § 1930(f);

(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7);

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;

(J) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is pending;

(K) a presumption has arisen under § 524(m) that a reaffirmation agreement is an undue hardship; or

(L) a motion is pending to delay discharge, because the debtor has not filed with the court all tax documents required to be filed under § 521(f).

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(3) If the debtor is required to file a statement under Rule 1007(b)(8), the court shall not grant a discharge earlier than 30 days after the statement is filed.

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Rule 4006. Notice of no discharge.

If an order is entered: denying a discharge; revoking a discharge; approving a waiver of discharge; or, in the case of an individual debtor, closing the case without the entry of a discharge, the clerk shall promptly notify all parties in interest in the manner provided by Rule 2002.

Rule 4007. Determination of dischargeability of a debt.

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(c) *Time for filing complaint under § 523(c) in a Chapter 7 liquidation, Chapter 11 reorganization, Chapter 12 family farmer's debt adjustment case, or Chapter 13 individual's debt adjustment case; notice of time fixed.*—Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

(d) *Time for filing complaint under § 523(a)(6) in a Chapter 13 individual's debt adjustment case; notice of time fixed.*—On motion by a debtor for a discharge under

§ 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(a)(6) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

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Rule 4008. Filing of reaffirmation agreement; statement in support of reaffirmation agreement.

(*a*) *Filing of reaffirmation agreement.*—A reaffirmation agreement shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a) of the Code. The court may, at any time and in its discretion, enlarge the time to file a reaffirmation agreement.

(*b*) *Statement in support of reaffirmation agreement.*—The debtor's statement required under § 524(k)(6)(A) of the Code shall be accompanied by a statement of the total income and expenses stated on schedules I and J. If there is a difference between the total income and expenses stated on those schedules and the statement required under § 524(k)(6)(A), the statement required by this subdivision shall include an explanation of the difference.

Rule 5001. Courts and clerks' offices.

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(*b*) *Trials and hearings; orders in chambers.*—All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. Except as otherwise provided in 28 U. S. C. § 152(c), all other acts or proceedings may be done or conducted by a judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

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Rule 5003. Records kept by the clerk.

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(*e*) *Register of mailing addresses of federal and state governmental units and certain taxing authorities.*—The United States or the state or territory in which the court is located may file a statement designating its mailing address. The United States, state, territory, or local governmental unit responsible for collecting taxes within the district in which the case is pending may also file a statement designating an address for service of requests under § 505(b) of the Code, and the designation shall describe where further information concerning additional requirements for filing such requests may be found. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes the mailing addresses designated under the first sentence of this subdivision, and a separate register of the addresses designated for the service of requests under § 505(b) of the Code. The clerk is not required to include in any single register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

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Rule 5008. Notice regarding presumption of abuse in Chapter 7 cases of individual debtors.

If a presumption of abuse has arisen under § 707(b) in a chapter 7 case of an individual with primarily consumer debts, the clerk shall within 10 days after the date of the filing of the petition notify creditors of the presumption of abuse in accordance with Rule 2002. If the debtor has not filed a statement indicating whether a presumption of abuse has arisen, the clerk shall within 10 days after the date of the filing of the petition notify creditors that the debtor has not filed the statement and that further notice will be given if a later filed statement indicates that a presumption of abuse has arisen. If a debtor later files a statement indicating that a presumption of abuse has arisen, the clerk shall notify creditors of the presumption of abuse as promptly as practicable.

Rule 6004. Use, sale, or lease of property.

. . . . .

(*g*) *Sale of personally identifiable information.*

(*1*) *Motion.*—A motion for authority to sell or lease personally identifiable information under § 363(b)(1)(B) shall include a request for an order directing the United States trustee to appoint a consumer privacy ombudsman under § 332. Rule 9014 governs the motion which shall be served on: any committee elected under § 705 or appointed under § 1102 of the Code, or if the case is a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list of creditors filed under Rule 1007(d); and on such other entities as the court may direct. The motion shall be transmitted to the United States trustee.

(*2*) *Appointment.*—If a consumer privacy ombudsman is appointed under § 332, no later than 5 days before the hearing on the motion under § 363(b)(1)(B), the United States trustee shall file a notice of the appointment, including the name and address of the person appointed. The United States trustee's notice shall be accompanied by a

verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(*b*) *Stay of order authorizing use, sale, or lease of property.*—An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.

Rule 6011. Disposal of patient records in health care business case.

(*a*) *Notice by publication under § 351(1)(A).*—A notice regarding the claiming or disposing of patient records under § 351(1)(A) shall not identify any patient by name or other identifying information, but shall:

(1) identify with particularity the health care facility whose patient records the trustee proposes to destroy;

(2) state the name, address, telephone number, email address, and website, if any, of a person from whom information about the patient records may be obtained;

(3) state how to claim the patient records; and

(4) state the date by which patient records must be claimed, and that if they are not so claimed the records will be destroyed.

(*b*) *Notice by mail under § 351(1)(B).*—Subject to applicable nonbankruptcy law relating to patient privacy, a notice regarding the claiming or disposing of patient records under § 351(1)(B) shall, in addition to including the information in subdivision (a), direct that a patient's family member or other representative who receives the notice inform the patient of the notice. Any notice under this subdivision shall be mailed to the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, to the Attorney Gen-

eral of the State where the health care facility is located, and to any insurance company known to have provided health care insurance to the patient.

(c) *Proof of compliance with notice requirement.*—Unless the court orders the trustee to file proof of compliance with §351(1)(B) under seal, the trustee shall not file, but shall maintain, the proof of compliance for a reasonable time.

(d) *Report of destruction of records.*—The trustee shall file, no later than 30 days after the destruction of patient records under §351(3), a report certifying that the unclaimed records have been destroyed and explaining the method used to effect the destruction. The report shall not identify any patient by name or other identifying information.

Rule 7012. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on the pleadings.

. . . . .

(b) *Applicability of Rule 12(b)–(i) F. R. Civ. P.*—Rule 12(b)–(i) F. R. Civ. P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

Rule 7022. Interpleader.

Rule 22(a) F. R. Civ. P. applies in adversary proceedings. This rule supplements—and does not limit—the joinder of parties allowed by Rule 7020.

Rule 7023.1. Derivative actions.

Rule 23.1 F. R. Civ. P. applies in adversary proceedings.

Rule 8001. Manner of taking appeal; voluntary dismissal; certification to court of appeals.

. . . . . .

(e) *Election to have appeal heard by district court instead of bankruptcy appellate panel; withdrawal of election.*

(1) *Separate writing for election.*—An election to have an appeal heard by the district court under 28 U. S. C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U. S. C. § 158(c)(1).

(2) *Withdrawal of election.*—A request to withdraw the election may be filed only by written stipulation of all the parties to the appeal or their attorneys of record. Upon such a stipulation, the district court may either transfer the appeal to the bankruptcy appellate panel or retain the appeal in the district court.

(f) *Certification for direct appeal to court of appeals.*

(1) *Timely appeal required.*—A certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U. S. C. § 158(d)(2) shall not be effective until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002.

(2) *Court where certification made and filed.*—A certification that a circumstance specified in 28 U. S. C. § 158(d)(2)(A)(i)–(iii) exists shall be filed in the court in which a matter is pending for purposes of 28 U. S. C. § 158(d)(2) and this rule. A matter is pending in a bankruptcy court until the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U. S. C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U. S. C. § 158(a)(3). A matter is pending in a district court or bankruptcy appellate panel after the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U. S. C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U. S. C. § 158(a)(3).

(A) *Certification by court on request or court's own initiative.*

(*i*) *Before docketing or grant of leave to appeal.*—Only a bankruptcy court may make a certification on request or on its own initiative while the matter is pending in the bankruptcy court.

(*ii*) *After docketing or grant of leave to appeal.*—Only the district court or bankruptcy appellate panel involved may make a certification on request of the parties or on its own initiative while the matter is pending in the district court or bankruptcy appellate panel.

(*B*) *Certification by all appellants and appellees acting jointly.*—A certification by all the appellants and appellees, if any, acting jointly may be made by filing the appropriate Official Form with the clerk of the court in which the matter is pending. The certification may be accompanied by a short statement of the basis for the certification, which may include the information listed in subdivision (f)(3)(C) of this rule.

(*3*) *Request for certification; filing; service; contents.*

(A) A request for certification shall be filed, within the time specified by 28 U. S. C. § 158(d)(2), with the clerk of the court in which the matter is pending.

(B) Notice of the filing of a request for certification shall be served in the manner required for service of a notice of appeal under Rule 8004.

(C) A request for certification shall include the following:

(i) the facts necessary to understand the question presented;

(ii) the question itself;

(iii) the relief sought;

(iv) the reasons why the appeal should be allowed and is authorized by statute or rule, including why a circumstance specified in 28 U. S. C. § 158(d)(2)(A)(i)–(iii) exists; and

(v) an attached copy of the judgment, order, or decree complained of and any related opinion or memorandum.

(D) A party may file a response to a request for certification or a cross request within 10 days after the notice of the request is served, or another time fixed by the court.

(E) Rule 9014 does not govern a request, cross request, or any response. The matter shall be submitted without oral argument unless the court otherwise directs.

(F) A certification of an appeal under 28 U. S. C. § 158(d)(2) shall be made in a separate document served on the parties.

(4) *Certification on court's own initiative.*

(A) A certification of an appeal on the court's own initiative under 28 U. S. C. § 158(d)(2) shall be made in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8004. The certification shall be accompanied by an opinion or memorandum that contains the information required by subdivision (f)(3)(C)(i)–(iv) of this rule.

(B) A party may file a supplementary short statement of the basis for certification within 10 days after the certification.

(5) *Duties of parties after certification.*—A petition for permission to appeal in accordance with F. R. App. P. 5 shall be filed no later than 30 days after a certification has become effective as provided in subdivision (f)(1).

Rule 8003. Leave to appeal.

. . . . . .

(d) *Requirement of leave to appeal.*—If leave to appeal is required by 28 U. S. C. § 158(a) and has not earlier been granted, the authorization of a direct appeal by a court of appeals under 28 U. S. C. § 158(d)(2) shall be deemed to satisfy the requirement for leave to appeal.

Rule 9006. Time.

. . . . . .

(*b*) *Enlargement.*

(*1*) *In general.*—Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(*2*) *Enlargement not permitted.*—The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024.

(*3*) *Enlargement governed by other rules.*—The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033, only to the extent and under the conditions stated in those rules. In addition, the court may enlarge the time to file the statement required under Rule 1007(b)(7), and to file schedules and statements in a small business case under § 1116(3) of the Code, only to the extent and under the conditions stated in Rule 1007(c).

(*c*) *Reduction.*

. . . . . .

(*2*) *Reduction not permitted.*—The court may not reduce the time for taking action under Rules 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 4008(a), 8002, and 9033(b). In addition, the court may not reduce the time under Rule 1007(c) to file the statement required by Rule 1007(b)(7).

. . . . . .

Rule 9009. Forms.

Except as otherwise provided in Rule 3016(d), the Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code. The forms shall be construed to be consistent with these rules and the Code.

Rule 9024. Relief from judgment or order.

Rule 60 F. R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(c), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

AMENDMENT TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendment to the Federal Rules of Civil Procedure was prescribed by the Supreme Court of the United States on April 23, 2008, pursuant to 28 U. S. C. §2072, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1150. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. §2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, 544 U. S. 1173, 547 U. S. 1233, and 550 U. S. 1003.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 2008

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendment to Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Committee Note submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 2008

ORDERED:

1. That the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions be, and they hereby are, amended by including therein the amendment to Rule C.

[See *infra*, p. 1153.]

2. That the foregoing amendment to the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions shall take effect on December 1, 2008, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE SUPPLEMENTAL RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS

Rule C. In rem actions: special provisions.

. . . . .

(6) *Responsive pleading; interrogatories.*

(*a*) *Statement of interest; answer.*—In an action in rem:

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

. . . . .

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 23, 2008, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1156. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, 541 U. S. 1103, 544 U. S. 1181, 547 U. S. 1269, and 550 U. S. 1165.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 2008

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 2008

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41, 45, 60, and new Rule 61.

[See *infra*, pp. 1159–1165.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2008, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 1. Scope; definitions.

. . . . .

(*b*) *Definitions.*—The following definitions apply to these rules:

. . . . .

(11) "Victim" means a "crime victim" as defined in 18 U. S. C. §3771(e).

. . . . .

Rule 12.1. Notice of an alibi defense.

. . . . .

(*b*) *Disclosing government witnesses.*

(*1*) *Disclosure.*

(*A*) *In general.*—If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) the name of each witness—and the address and telephone number of each witness other than a victim—that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense; and

(ii) each government rebuttal witness to the defendant's alibi defense.

(*B*) *Victim's address and telephone number.*—If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

(2) *Time to disclose.*—Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) *Continuing duty to disclose.*

(1) *In general.*—Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness—and the address and telephone number of each additional witness other than a victim—if:

(A) the disclosing party learns of the witness before or during trial; and

(B) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) *Address and telephone number of an additional victim witness.*—The address and telephone number of an additional victim witness must not be disclosed except as provided in Rule 12.1(b)(1)(B).

. . . . .

Rule 17. Subpoena.

. . . . .

(c) *Producing documents and objects.*

. . . . .

(3) *Subpoena for personal or confidential information about a victim.*—After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circum-

stances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

. . . . .

Rule 18. Place of prosecution and trial.

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Rule 32. Sentencing and judgment.

(*a*) *[Reserved.]*

. . . . .

(*c*) *Presentence investigation.*

(*1*) *Required investigation.*

. . . . .

(*B*) *Restitution.*—If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

. . . . .

(*d*) *Presentence report.*

. . . . .

(*2*) *Additional information.*—The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

. . . . .

(*i*) *Sentencing.*

. . . . .

(*4*) *Opportunity to speak.*

(*A*) *By a party.*—Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(*B*) *By a victim.*—Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

. . . . .

Rule 41. Search and seizure.

. . . . .

(*b*) *Authority to issue a warrant.*—At the request of a federal law enforcement officer or an attorney for the government:

. . . . .

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism—with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for

property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises—no matter who owns them—of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

. . . . .

Rule 45. Computing and extending time.

. . . . .

(c) *Additional time after certain kinds of service.*—Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 60. Victim's rights.

(a) *In general.*

(1) *Notice of a proceeding.*—The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) *Attending the proceeding.*—The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable

alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) *Right to be heard on release, a plea, or sentencing.*—The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.

(b) *Enforcement and limitations.*

(1) *Time for deciding a motion.*—The court must promptly decide any motion asserting a victim's rights described in these rules.

(2) *Who may assert the rights.*—A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U. S. C. §3771(d) and (e).

(3) *Multiple victims.*—If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.

(4) *Where rights may be asserted.*—A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.

(5) *Limitations on relief.*—A victim may move to reopen a plea or sentence only if:

(A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) *No new trial.*—A failure to afford a victim any right described in these rules is not grounds for a new trial.

Rule 61. Title.

These rules may be known and cited as the Federal Rules of Criminal Procedure.

INDEX

ADMINISTRATIVE REFUND CLAIMS. See **Taxes**, 1.

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Federal-sector employment discrimination—Retaliation claim.—ADEA's federal-sector provision, 29 U. S. C. § 633a(a)—which requires that "[a]ll personnel actions affecting employees . . . at least 40 years of age . . . be made free from any discrimination based on age"—prohibits retaliation against a federal employee who complains of age discrimination. Gómez-Pérez v. Potter, p. 474.

ALABAMA. See **Voting Rights Act of 1965.**

ALIENS DESIGNATED AS ENEMY COMBATANTS. See **Constitutional Law**, VIII.

AMERICAN CITIZENS HELD OVERSEAS BY AMERICAN FORCES. See **Habeas Corpus.**

APPROVAL OF FALSE CLAIMS. See **False Claims Act.**

ARMED CAREER CRIMINAL ACT. See **Criminal Law**, 1, 2.

ARTICLE III JUDGES. See **Federal Magistrates Act.**

ATTORNEY'S FEES.

Equal Access to Justice Act—Recovery of paralegal fees.—A prevailing party that satisfies EAJA's other requirements for reimbursement of attorney's fees, expenses, and costs may recover paralegal fees from Government at prevailing market rates. Richlin Security Service Co. v. Chertoff, p. 571.

BURDEN OF PROOF. See **False Claims Act.**

CAPITAL GAINS TAXES. See **Taxes**, 2.

CAPITAL MURDER. See **Constitutional Law**, II.

CARRYING EXPLOSIVES DURING A FELONY. See **Criminal Law**, 3.

CHILD PORNOGRAPHY. See **Constitutional Law**, III; V.

CIVIL RIGHTS ACT OF 1866.

Employment discrimination—Retaliation claim.—Title 42 U. S. C. § 1981—which gives "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"—encompasses a complaint of retaliation against a person who complained about a violation of another person's employment-contract-related "right." CBOCS West, Inc. v. Humphries, p. 442.

CLASS-OF-ONE EQUAL PROTECTION THEORY. See **Constitutional Law,** IV.

COMMERCE CLAUSE. See **Constitutional Law,** I.

CONSTITUTIONAL LAW.

I. Commerce Clause.

Discrimination against interstate commerce—State taxes on bonds.—Kentucky's differential tax scheme—which exempts from state income taxes interest on bonds issued by Kentucky or its political subdivisions but not on bonds issued by other States and their subdivisions—does not offend Commerce Clause. Department of Revenue of Ky. v. Davis, p. 328.

II. Cruel and Unusual Punishment.

Execution methods—Lethal-injection protocol.—Kentucky Supreme Court's judgment upholding Kentucky's three-drug lethal-injection protocol against petitioners' claim that it violates Eighth Amendment's "cruel and unusual punishments" ban is affirmed. Baze v. Rees, p. 35.

III. Due Process.

Vagueness—Child pornography.—As construed by this Court, 18 U. S. C. § 2252A(a)(3)(B)—which criminalizes, in specified circumstances, pandering or solicitation of child pornography—is not impermissibly vague under Due Process Clause. United States v. Williams, p. 285.

IV. Equal Protection of the Laws.

"Class of one"—Public employment.—"Class-of-one" equal protection theory—under which a claimant alleges that she was mistreated not because she was a member of an identified class (*e. g.*, race, sex, or national origin), but simply for arbitrary, vindictive, and malicious reasons—does not apply in public employment context. Engquist v. Oregon Dept. of Agriculture, p. 591.

V. Freedom of Speech.

Overbreadth doctrine—Child pornography.—As construed by this Court, 18 U. S. C. § 2252A(a)(3)(B)—which criminalizes, in specified circumstances, pandering or solicitation of child pornography—is not overbroad under First Amendment. United States v. Williams, p. 285.

CONSTITUTIONAL LAW—Continued.

VI. Right to Vote.

Photo identification requirement.—Seventh Circuit's judgment upholding constitutionality of an Indiana statute requiring citizens voting in person to present government-issued photo identification is affirmed. Crawford v. Marion County Election Bd., p. 181.

VII. Searches and Seizures.

Probable cause for arrest—Search incident to arrest.—Police did not violate Fourth Amendment when they made an arrest that was based on probable cause but prohibited by Virginia law or when they performed a search incident to that arrest. Virginia v. Moore, p. 164.

VIII. Suspension Clause.

Habeas corpus privilege—Withdrawal of federal-court jurisdiction.—Petitioners, aliens designated as enemy combatants and detained at Guantanamo Bay, Cuba, have constitutional privilege of habeas corpus, which cannot be withdrawn except in conformance with Suspension Clause; because Detainee Treatment Act of 2005's procedures for review of detainees' status are not an adequate and effective substitute for habeas, § 7 of Military Commissions Act of 2006, which withdraws federal-court habeas jurisdiction with respect to petitioners, operates as an unconstitutional suspension of writ. Boumediene v. Bush, p. 723.

CRIMINAL LAW. See also **Constitutional Law,** II; III; V; VII; **Federal Magistrates Act.**

1. *Armed Career Criminal Act—Sentence enhancement—State drug-trafficking convictions—Sentencing under state recidivist law.*—Because a state drug-trafficking conviction qualifies as "a serious drug offense" if "a maximum term . . . of ten years or more is prescribed by law," 18 U. S. C. § 924(e)(2)(A)(ii), and maximum term respondent faced on Washington state drug convictions was 10 years under a state recidivist law, those state convictions had to be counted under ACCA to enhance respondent's sentence on his conviction for federal crime of possession of a firearm by a convicted felon, § 922(g)(1). United States v. Rodriquez, p. 377.

2. *Armed Career Criminal Act—Violent felony—Felony driving under influence conviction.*—Felony driving under influence of alcohol, as defined by New Mexico law, is not a "violent felony" under ACCA, which provides a 15-year mandatory minimum prison term for a defendant, convicted of possessing a firearm, who has three prior convictions "for a violent felony," 18 U. S. C. § 924(e)(1). Begay v. United States, p. 137.

3. *Carrying explosives while making a false statement to a customs official—Relationship between explosive carried and underlying felony.*—Since respondent was carrying explosives when he made a false

CRIMINAL LAW—Continued.

statement to a customs official in violation of 18 U. S. C. § 1001, he was carrying them "during" commission of that felony, in violation of § 844(h)(2), even though there was no relationship between explosive carried and underlying felony. United States v. Ressam, p. 272.

4. *Federal drug offenses—Mandatory minimum sentences based on previous felony convictions—Effect of state-law classification of offense.*—Under 21 U. S. C. § 841(b)(1)(A), which enhances mandatory minimum sentence for certain federal drug crimes when defendant was previously convicted of a "felony drug offense," quoted term is defined exclusively by § 802(44) to "mea[n] an offense . . . punishable by imprisonment for more than one year under any law of . . . a State," and does not incorporate § 802(13)'s definition of "felony" as any "offense classified by applicable . . . law as a felony," so that a state drug offense punishable by more than one year qualifies as a "felony drug offense," even if state law classifies offense as a misdemeanor. Burgess v. United States, p. 124.

5. *Money laundering—Vacatur of convictions.*—Seventh Circuit's judgment affirming District Court's vacatur of respondents' money-laundering convictions on grounds that 18 U. S. C. § 1956(a)(1)(A)'s criminal "proceeds" strictures apply to transactions involving criminal "profits," not criminal "receipts," and that there was no evidence that transactions on which convictions were based involved profits from respondents' illegal lottery operation, is affirmed. United States v. Santos, p. 507.

6. *Sentencing—Variance from Federal Guidelines range—Federal Rules of Criminal Procedure.*—Rule 32(h)'s notice requirement does not apply to a variance from a recommended Federal Sentencing Guidelines range. Irizarry v. United States, p. 708.

7. *Transporting unlawful-activity proceeds across border—Proof requirement.*—Although 18 U. S. C. § 1956(a)(2)(B)(i)—which prohibits transporting unlawful-activity proceeds across border knowing that transportation was designed "to conceal or disguise the nature, the location, the source, the ownership, or the control" of funds—does not require proof that defendant attempted to create appearance of legitimate wealth, neither can it be satisfied solely by evidence that funds were concealed during transport: A conviction requires proof that transportation's purpose, not merely its effect, was to conceal or disguise one of listed attributes. Regalado Cuellar v. United States, p. 550.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law**, II.

CUSTOMS. See **Criminal Law**, 3.

DEATH PENALTY. See **Constitutional Law**, II

DETAINEE TREATMENT ACT OF 2005. See **Constitutional Law,** VIII.

DIFFERENTIAL STATE TAX SCHEMES. See **Constitutional Law,** I.

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See **Constitutional Law,** I.

DISCRIMINATION BASED ON AGE. See **Age Discrimination in Employment Act of 1967.**

DISCRIMINATION BASED ON RACE. See **Civil Rights Act of 1866; Voting Rights Act of 1965.**

DISCRIMINATION IN EMPLOYMENT. See **Age Discrimination in Employment Act of 1967; Civil Rights Act of 1866; Constitutional Law,** IV.

DISCRIMINATION IN VOTING. See **Voting Rights Act of 1965.**

DRIVING UNDER INFLUENCE. See **Criminal Law,** 2.

DRUG OFFENSES. See **Criminal Law,** 1, 4.

DUE PROCESS. See **Constitutional Law,** III.

EIGHTH AMENDMENT. See **Constitutional Law,** II.

ELECTION PRACTICES. See **Constitutional Law,** VI; **Voting Rights Act of 1965.**

EMPLOYER AND EMPLOYEES. See **Age Discrimination in Employment Act of 1967; Civil Rights Act of 1866; Constitutional Law,** IV.

EMPLOYMENT DISCRIMINATION. See **Age Discrimination in Employment Act of 1967; Civil Rights Act of 1866; Constitutional Law,** IV.

ENEMY COMBATANTS. See **Constitutional Law,** VIII.

ENHANCED SENTENCES. See **Criminal Law,** 1, 2, 4.

EQUAL ACCESS TO JUSTICE ACT. See **Attorney's Fees.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV.

EXECUTION METHODS. See **Constitutional Law,** II.

EXHAUSTION OF PATENTS. See **Patent Laws.**

EXPLOSIVES CARRIED DURING A FELONY. See **Criminal Law,** 3.

EXPORT CLAUSE. See **Taxes,** 1.

FALSE CLAIMS ACT.

Proof requirements.—It is insufficient for a plaintiff asserting a cause of action under Act to show merely that use of a false statement resulted in payment or approval of a false claim or that Government money was used to pay claim; instead, such a plaintiff must prove that defendant intended that false statement be material to Government's decision to pay or approve false claim; nor is it enough for a plaintiff to show that alleged conspirators agreed upon a fraud scheme that had effect of causing a private entity to make payments using money obtained from Government; instead, it must be shown that they intended "to defraud Government." Allison Engine Co. v. United States *ex rel.* Sanders, p. 662.

FALSE STATEMENTS TO CUSTOMS OFFICIALS. See **Criminal Law,** 3.

FEDERAL-COURT JURISDICTION. See **Constitutional Law,** VIII; **Habeas Corpus.**

FEDERAL DRUG OFFENSES. See **Criminal Law,** 4.

FEDERAL MAGISTRATES ACT.

Jury selection—Waiver of right to an Article III judge—Sufficiency of defense counsel's consent.—Express consent by a defendant's counsel suffices to waive right to have an Article III judge preside over jury selection in a federal felony trial and to permit a magistrate judge to preside pursuant to Act, which allows a magistrate judge to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U. S. C. §636(b)(3). Gonzalez v. United States, p. 242.

FEDERAL RULES OF BANKRUPTCY PROCEDURE.

Amendments to Rules, p. 1105.

FEDERAL RULES OF CIVIL PROCEDURE.

1. Amendment to Rules, p. 1149.

2. *Dismissal of interpleader action—Required parties immune from suit.*—Federal Rule of Civil Procedure 19 requires dismissal of this interpleader action involving assets of late Ferdinand Marcos because of absence of Republic of Philippines and a Philippine commission, which are required parties who are immune from suit under foreign sovereign immunity doctrine. Republic of Philippines v. Pimentel, p. 851.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Criminal Law,** 6.

Amendments to Rules, p. 1155.

FEDERAL-SECTOR EMPLOYMENT DISCRIMINATION. See **Age Discrimination in Employment Act of 1967.**

FEDERAL SENTENCING GUIDELINES. See **Criminal Law,** 6.

FEDERAL-STATE RELATIONS. See **Criminal Law,** 1, 2, 4.

FEDERAL TAX REFUNDS. See **Taxes,** 1.

FIFTH AMENDMENT. See **Constitutional Law,** III.

FIREARM OFFENSES. See **Criminal Law,** 1, 2.

FIRST AMENDMENT. See **Constitutional Law,** V.

FOREIGN SOVEREIGNS. See **Federal Rules of Civil Procedure,** 2; **Habeas Corpus.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** IV; VI.

FOURTH AMENDMENT. See **Constitutional Law,** VII.

FREEDOM OF SPEECH. See **Constitutional Law,** V.

GUANTANAMO BAY. See **Constitutional Law,** VIII.

HABEAS CORPUS. See also **Constitutional Law,** VIII.

Jurisdiction—American citizens held overseas by American forces—Transfer to foreign sovereign.—Federal habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command; federal district courts, however, may not exercise their habeas jurisdiction to enjoin United States from transferring individuals alleged to have committed crimes and detained within a foreign sovereign's territory to that sovereign for criminal prosecution. Munaf v. Geren, p. 674.

ILLINOIS. See **Taxes,** 2.

IMMUNITY FROM SUIT. See **Federal Rules of Civil Procedure,** 2.

INCOME TAXES. See **Constitutional Law,** I.

INDIANA. See **Constitutional Law,** VI.

INTERPLEADER ACTIONS. See **Federal Rules of Civil Procedure,** 2.

INTERSTATE COMMERCE. See **Constitutional Law,** I.

JURY SELECTION. See **Federal Magistrates Act.**

KENTUCKY. See **Constitutional Law,** I; II.

LETHAL-INJECTION PROTOCOL. See **Constitutional Law,** II.

MAGISTRATE JUDGES. See **Federal Magistrates Act.**

MAIL FRAUD. See **Racketeer Influenced and Corrupt Organizations Act.**

METHOD PATENTS. See **Patent Laws.**

MILITARY COMMISSIONS ACT OF 2006. See **Constitutional Law,** VIII.

MILITARY DETENTION OF AMERICAN CITIZENS. See **Habeas Corpus.**

MINIMUM SENTENCES. See **Criminal Law,** 2, 4.

MONEY LAUNDERING. See **Criminal Law,** 5.

NEW MEXICO. See **Criminal Law,** 2.

NONPARTY PRECLUSION. See **Preclusion.**

OVERBREADTH DOCTRINE. See **Constitutional Law,** V.

PANDERING OF CHILD PORNOGRAPHY. See **Constitutional Law,** III; V.

PARALEGAL FEES. See **Attorney's Fees.**

PATENT LAWS.

Patent exhaustion—Method patents.—Because patent exhaustion doctrine applies to method patents, and because license agreement in this case authorizes sale of components that substantially embody patents in suit, doctrine prevents respondent from further asserting its patent rights with respect to patents substantially embodied by those products. Quanta Computer, Inc. v. LG Electronics, Inc., p. 617.

PAYMENT OF FALSE CLAIMS. See **False Claims Act.**

PHILIPPINES. See **Federal Rules of Civil Procedure,** 2.

PHOTO IDENTIFICATION REQUIREMENT FOR VOTERS. See **Constitutional Law,** VI.

PORNOGRAPHY. See **Constitutional Law,** III; V.

PRECLEARANCE OF ELECTION PRACTICES. See **Voting Rights Act of 1965.**

PRECLUSION.

Virtual representation—Federal-question case.—Theory of preclusion by "virtual representation" is disapproved; preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to established grounds for nonparty preclusion. Taylor v. Sturgell, p. 880.

PROOF REQUIREMENTS IN FALSE CLAIMS ACT CASES. See **False Claims Act.**

PUBLIC EMPLOYER AND EMPLOYEES. See **Age Discrimination in Employment Act of 1967; Constitutional Law,** IV.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1866; Voting Rights Act of 1965.**

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

Mail fraud—Reliance on misrepresentations.—A plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on defendant's alleged misrepresentations. Bridge v. Phoenix Bond & Indemnity Co., p. 639.

RECIDIVIST ENHANCEMENTS. See **Criminal Law,** 1.

REFUND OF FEDERAL TAXES. See **Taxes,** 1.

REQUIRED PARTIES TO SUIT. See **Federal Rules of Civil Procedure,** 2.

RETALIATION CLAIMS. See **Age Discrimination in Employment Act of 1967; Civil Rights Act of 1866.**

RIGHT TO VOTE. See **Constitutional Law,** VI; **Voting Rights Act of 1965.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VII.

SENTENCE ENHANCEMENTS. See **Criminal Law,** 1, 2.

SOLICITATION OF CHILD PORNOGRAPHY. See **Constitutional Law,** III; V.

SOVEREIGN IMMUNITY. See **Federal Rules of Civil Procedure,** 2.

STATE TAXES. See **Constitutional Law,** I; **Taxes,** 2.

SUPREME COURT.

Amendments to Federal Rules of Bankruptcy Procedure, p. 1105.

Amendment to Federal Rules of Civil Procedure, p. 1149.

Amendments to Federal Rules of Criminal Procedure, p. 1155.

SUSPENSION CLAUSE. See **Constitutional Law,** VIII.

TAXES. See also **Constitutional Law,** 1.

1. *Federal taxes—Refund claim—Collection in violation of Export Clause.*—Plain language of 26 U. S. C. §§ 7422(a) and 6511 requires a taxpayer seeking a refund for a tax assessed in violation of Export Clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against Government. United States v. Clintwood Elkhorn Mining Co., p. 1.

2. *State taxes—Capital gains—Unitary businesses.*—Illinois courts erred in upholding a state tax on an apportioned share of a multistate corporation's capital gain realized from sale of a business division after those courts determined that division and corporation were not "unitary." MeadWestvaco Corp. v. Illinois Dept. of Revenue, p. 16.

TRANSPORTING UNLAWFUL-ACTIVITY PROCEEDS ACROSS BORDER. See **Criminal Law,** 7.

UNITARY BUSINESSES. See **Taxes,** 2.

UNITED STATES SENTENCING GUIDELINES. See **Criminal Law,** 6.

VACATUR OF CONVICTIONS. See **Criminal Law,** 5.

VIRGINIA. See **Constitutional Law,** VII.

VIRTUAL REPRESENTATION. See **Preclusion.**

VOTING RIGHTS. See **Constitutional Law,** VI; **Voting Rights Act of 1965.**

VOTING RIGHTS ACT OF 1965.

Preclearance—New election practice invalidated—Prior practice reinstated.—Because an Alabama election law invalidated by State Supreme Court under State Constitution never gained "force or effect" for purposes of § 5 of VRA, Alabama's reinstatement of its prior gubernatorial appointment practice did not rank as a "change" requiring preclearance. Riley v. Kennedy, p. 406.

WASHINGTON. See **Criminal Law,** 1.

WORDS AND PHRASES.

1. "*All persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.*" Rev. Stat. § 1977, 42 U. S. C. § 1981(a). CBOCS West, Inc. v. Humphries, p. 442.

2. "*Discrimination based on age.*" Age Discrimination in Employment Act of 1967, 29 U. S. C. § 633a(a). Gómez-Pérez v. Potter, p. 474.

WORDS AND PHRASES—Continued.

3. "*Felony drug offense.*" 21 U. S. C. §841(b)(1)(A). Burgess v. United States, p. 124.

4. "*Violent felony.*" Armed Career Criminal Act, 18 U. S. C. §924(e)(1). Begay v. United States, p. 137.